Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1995

HERMAN SKINNER,

Petitioner,

vs.

CITY OF MIAMI, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE COURT OF APPEALS ERRED, CREATING EXPRESS INTER-CIRCUIT CONFLICT, IN HOLDING SUA SPONTE THAT THE SEXUAL ABUSES FOUND BY THE JURY TO HAVE BEEN COMMITTED BY THE CITY OF MIAMI'S FIRE FIGHTERS AS A PRODUCT OF THE CITY'S POLICY, CUSTOM OR PRACTICE, DID NOT VIOLATE HERMAN SKINNER'S RIGHT TO SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND THEREFORE DID NOT RENDER THE CITY LIABLE UNDER 42 U.S.C. § 1983.

2. WHETHER THE COURT OF APPEALS ERRED IN SUA SPONTE RELIEVING THE CITY OF MIAMI OF ITS STIPULATION THAT THE SEXUAL ABUSES OF ITS FIRE FIGHTERS, IF PROVED TO REFLECT THE CITY'S POLICY, CUSTOM OR PRACTICE, VIOLATED HERMAN SKINNER'S RIGHT TO SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND THUS RENDERED THE CITY LIABLE UNDER 42 U.S.C. § 1983.

3. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT HERMAN SKINNER'S § 1983 CLAIM UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AS APPLICABLE TO THE CITY OF MIAMI UNDER THE FOURTEENTH AMENDMENT, WAS ABANDONED BY HIS COUNSEL AT ORAL ARGUMENT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, Herman Skinner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-styled proceeding on August 25, 1995, and rendered by the denial of rehearing on June 25, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 62 F.3d 344, and is reprinted in the Appendix at 1a. The judgment of the United States District Court for the Southern District of Florida is reprinted in the Appendix at 19a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The instant petition was filed within 90 days of the court of appeals' denial of the petitioner's timely-filed motion for rehearing (17a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Fourth Amendment, United States Constitution: "The right of the people to be secure in their persons, houses,

papers, and effects, against unreasonable searches and seizures, shall not be violated . . . . "

Fourteenth Amendment, United States Constitution: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . . "

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

1. Overview. The instant case presents the civil counterpart of *United States v. Lanier*, 64 U.S.L.W. 3837, No. 95-1717, *cert. granted* June 17, 1996, in which the Court will review the Sixth Circuit Court's en banc declaration that the sexual harassment and assault of state judicial employees and litigants by a state judge did not constitute the criminal deprivation of constitutional rights under 18 U.S.C. § 242. *See* 73 F. 3d 1380 (6th Cir. 1996) (en banc). Whether or not the Court determines that the compass of conduct criminalized by § 242 is narrower than the circle of constitutional rights protected by § 1983, the two questions at the least are complimentary, and the civil issue is further confused by express inter-circuit conflict, discussed *infra*.

Moreover, the issue arises here in the context of both sides' agreement that the plaintiff's constitutional rights were implicated. From the trial transcript, R8-220-307[1]:

> MR. MAYS [counsel for the City of Miami]: Yes, let the jury know that I have agreed to that.
>
> THE COURT: Okay. The parties have agreed.
>
> MS. EISENBERG [plaintiff's counsel]: That the seizure and physical abuse, if that is what you want to call it.
>
> THE COURT: That seizure and physical abuse did occur, so there is a stipulation that Mr. Skinner's constitutional rights were violated?
>
> MR. MAYS: Yes, Your Honor.

From the district court's charge to the jury (R9-221-64-66):

> In order to determine whether a plaintiff can recover from a defendant under what we call a Section 1983, under that law, for deprivation of his constitutionally guaranteed rights to be free from unlawful seizure or physical abuse – well, I was going to tell you that the first thing you must do is find that seizure and physical abuse occurred.
>
> That is what I would normally tell you. However, in this particular case, the parties have reached a stipulation, and they have agreed that said seizure and physical abuse did

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[1] The citation is to Volume 8 of the Record on Appeal in the court of appeals, Document 220, page 307.

occur, so you don't have to reach that determination.

You must accept that, because both sides told you from the very beginning that did occur.

* * *

Plaintiff, Mr. Skinner, alleges that the City of Miami is liable for this constitutional deprivation because the actions of these fire fighters were permitted to occur because of customs, practices or policies of the City of Miami Fire Department, which reflect a deliberate indifference to the rights of persons employed as fire fighters.

From the court of appeals' opinion (7a-9a):

Skinner has proven that he was assaulted – that, however, is a tort created by state law, and not necessarily a violation of a constitutional right. [Footnote omitted]. Skinner has failed to show a violation of any right secured by federal law either under the Constitution or a federal statute.

* * *

Skinner argues that we should not consider the issue of a constitutional violation because it was not raised by the City in the district court or on appeal. . . . Whether a constitutional violation has occurred is a question of law and the refusal to consider it would result in a miscarriage of justice – especially when a $1.3 million verdict is at issue.

2. *Procedural History in the District Court.* In an action first filed in January of 1990 (R1-1), Plaintiff Herman Skinner alleged that he is a City of Miami fire

fighter, who in December of 1989 was sexually assaulted, handcuffed and physically constrained by his fellow fire fighters as part of ritualistic "horseplay and hazing" reflecting a "custom or policy" encouraged or tolerated by the City and its officials, in violation of his rights under the Fourth, Fifth and Fourteenth Amendments of the U.S. Constitution and thus of 42 U.S.C. § 1983 (R1-29-4-7). The City answered with a general denial (R1-44); and later it moved for summary judgment on the ground that any abuses by Mr. Skinner's fellow fire fighters were not committed under color of law, because they were not the product of any act or omission by the City (R2-144; R2-145; R2-153; R2-154-4-6, 12). The City raised no contention that the alleged misconduct did not constitute a due process violation even if attributable to the City; nor did the City identify any such issue in the parties' Joint Pre-trial Stipulation, in which the three issues of law listed were whether the City had "unconstitutionally hired, trained and supervised its fire fighters"; whether the fire chief was entitled to a qualified immunity; and whether the alleged restraint of Plaintiff Herman Skinner constituted a seizure under the Fourth Amendment (an issue subsequently abandoned) (R2-146-8-9).[2]

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[2] The City also stipulated to the operative facts of the incident involving Plaintiff Skinner – that two fellow fire fighters "approached him from the rear and wrestled him to the floor"; "[w]hile on the floor, hand cuffs were applied to Skinner's wrists"; "[a]fter Skinner was hand cuffed on the floor, Boyd – who was nude – straddled Skinner's chest, grabbed his head and rubbed his sexual organs over the top of Skinner's head and then released his hand. Everyone laughed except for Skinner, who demanded that the hand cuffs be removed" (R2-146-4).

Mr. Skinner settled before trial with all but one of the individual defendants (4a), and at the close of his case the district court directed a verdict for the fire chief (4a; R8-220-237-40). The City also moved for a directed verdict – on the sole ground that Plaintiff Skinner had failed to prove a custom, practice or policy on the City's part, or that the fire fighters were acting under color of law (R8-220-223-25). The district court denied the motion (R8-220-236-40), as it did at the close of all the evidence (*id.* at 290-91). During the charge conference, as we noted, the City agreed that the sole issue of liability for the jury's determination was whether the fire fighters' conduct was attributable to the City, and stipulated that if the jury made such a finding, "Mr. Skinner's constitutional rights were violated" (R8-220-306-07). And the City agreed to that portion of the verdict form which asked: "Did the City of Miami cause the violation of the constitutional rights of the plaintiff, Herman Skinner, through a policy, custom or practice . . . " (*see* R5-217-325-27).[3]

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[3] The court of appeals substantially understated the City's stipulation in acknowledging that "[m]inimal attention was paid to the issue of constitutional violation in the district court" (7a), while asserting that "[t]he issue, moreover, was not ignored entirely during the proceedings below. When discussing proposed jury instructions, counsel for the City did object to proposed wording and acknowledged that 'in order for [plaintiff] to have a [s]ection 1983 case, you [must] have a right that exists under the Federal constitution or [under a] federal statute.' Record, Vol. 8 at 301" (9a). In fact, the colloquy in question proves exactly the opposite. It consisted of defense counsel's effort to ensure that the district court's charge to the jury listed only those allegations which admittedly implicated constitutional rights. Thus the City's counsel argued (successfully) for deletion of language concerning "degrading

The jury returned a verdict against the City in the amount of $1.3 million (R3-182), and the district court entered judgment (R3-185). The City's post-trial motions focused almost entirely upon various evidentiary rulings and the amount of damages, but also repeated the City's contention that it did not have "a policy, custom or practice which encouraged, tolerated or condoned a fire fighter acting in the manner of the five fire fighters who sexually assaulted the plaintiff on December 9, 1989"; and thus the "unassailable facts are inconsistent with the conclusion that the City encouraged, condoned or approved of the misconduct of the fire fighters who sexually assaulted the plaintiff" (R3-186-9, 10). The district court denied the motion (R3-190).

3. *In the Court of Appeals.* The City's appellate brief was consistent with its prior stipulations, arguing for judgment solely on the ground that the fire fighters' sexual assault of the plaintiff was not the product of the City's custom, practice or policy (Brief of Appellant at 13-21), and that the fire fighters did not otherwise act under color of law (*id.* at 22-24). In the process, the City again conceded that if it was responsible for the acts in question, they did rise to the level of a constitutional violation (brief at 22):

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and humiliating embarrassment," while acknowledging repeatedly that the plaintiff's evidence implicated well-recognized constitutional rights – for example, the right "[t]o be free from unreasonable seizures" (R8-220-303). As defense counsel put it, *id.* at 305: "Let's leave in 'to be free from unreasonable seizures and physical abuse.' That's what we are talking about, physical abuse."

> It is fundamental that in a Section 1983 action, the Plaintiff must prove two separate and distinct elements: first, that the plaintiff was deprived of a federally protected right; and second, that the wrongdoer acted under color of law. [Citations omitted].
>
> It is the second element of a Section 1983 claim that the Plaintiff failed to prove, namely that the fire fighters acted under color of law.

And later in its brief, the City acknowledged (p. 24): "The act perpetrated against Plaintiff by the fire fighters was enough to outrage any person possessing common notions of decency, consideration and morality . . . . "

By the time of oral argument, therefore, the constitutional question had never been raised, and indeed had been stipulated to by the City. After the oral argument, which apparently was dominated by the constitutional question, both parties were granted leave to file supplemental memoranda (Nov. 3, 1995 order of the court of appeals); and the appellate court's subsequent decision was confined to that issue (5a-7a). As the court of appeals noted (3a), the primary offense occurred when Plaintiff Skinner's fellow fire fighters

> approached him from behind and wrestled him to the floor. Handcuffs were applied to Skinner's wrists while he was on the floor. As Skinner was on the floor handcuffed, Boyd, who was naked, straddled Skinner's chest, grabbed Skinner's head, and rubbed his scrotum over the top of Skinner's head. Everyone present laughed except for Skinner, who demanded that the handcuffs be removed.

As the dissenting opinion notes, "Skinner presented considerable evidence showing a long standing custom and practice of unfettered hazing by fellow employees, on a number of occasions, including group attacks upon a single fire fighter who had been recently promoted or married, or the like" (12a). These incidents, one of which involved Skinner himself (R5-217-105-13), are summarized at length in the dissenting opinion (12a). The majority opinion is unconcerned with the State's alleged complicity, because of its finding that the conduct in question did not rise to the level of a constitutional violation. The plaintiff's Fourth Amendment allegation, which was pressed throughout the course of the district court proceeding, is dismissed in a single sentence: "At oral argument, Skinner's counsel acknowledged that there had been no Fourth Amendment violation" (5a). The court then held that there was no substantive due process violation, but only "a tort created by state law" (7a); and excused the City's stipulation to the contrary because the question assertedly was one of law, and affirmance would be "miscarriage of justice . . . " (9a). Thus, having found that some undisclosed remark by the plaintiff's counsel at oral argument waived reliance on the Fourth Amendment, the appellate court relieved the other party of an explicit stipulation. Over a vigorous dissent, the court of appeals therefore reversed the judgment, and remanded with instructions to enter judgment for the City (10a). The instant proceeding ensued.

REASONS FOR GRANTING THE PETITION

1. The Merits. This Court has accepted review of *United States v. Lanier*, 73 F. 3d 1380 (6th Cir. 1996) (en banc), *cert. granted*, 64 U.S.L.W. 3837 (No. 95-1717, June 17, 1996), holding that a state judge's sexual harassment and assault of judicial employees and litigants did not constitute a constitutional crime under 18 U.S.C. § 242. The instant case presents the civil analogue of the question presented in *Lanier*.

As the dissenting opinion demonstrates, the court of appeals erred in concluding that the City's transgressions did not, as a matter of law, rise to the level of a substantive due process violation. As a result, the decision creates explicit inter-circuit conflict with *McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191 (4th Cir. 1996), *petition for cert. pending* (No. 95-1389), holding that the County employees' sexual taunting and physical assaults of their fellow worker, if attributable to the County, violated his right of substantive due process and thus created a cause of action under § 1983, *id.* at 1197:

> We may assume that McWilliams' proffer of evidence sufficed to support a finding that he suffered constitutional injury as a result of the physical assaults allegedly involved in the course of his general harassment by coworkers. The Due Process Clause of the Fourteenth Amendment affords, as one of its components, "substantive" protection against unreasonable bodily intrusions by state-actors. [Citation omitted]. The physical assaults alleged by McWilliams would, if proven, constitute the infliction of constitutional injury.

Accord, McDowell v. Manchester Fire Department, 769 F. Supp. 40, 43-45 (D.N.H. 1990) (physical abuse of fire fighter by his station captain). The court of appeals' decision in the instant case expressly and directly conflicts with *McWilliams*; and it also conflicts with two lines of authority upon which *McWilliams* is based.

First, at the core of substantive due process is the individual's right of bodily integrity, which is protected from state action not only in a custodial setting, as the court of appeals suggested (9a), but outside it as well. As the Court put it in condemning the paddling of a student on procedural due process grounds in *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977), "[a]mong the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security"; and although "the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment. . . . It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law." *Accord, Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law"), *quoted on the constitutional question* in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 269 (1990). *See Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 18 (1979) (Powell, J., concurring) ("Liberty

from bodily restraint always has been recognized as the core of the liberty protected by the due process clause from arbitrary government action"). *See, e. g., Cruzan v. Director, Missouri Department of Health,* 497 U.S. at 278 (forced feeding and hydration of patient in a coma); *Washington v. Harper,* 494 U.S. 210, 221-22, 229 (1990) (unwanted administration of antipsychotic drugs); *Youngberg v. Romeo,* 457 U.S. 307, 324 (1982) (shackling of mental patient); *Breithaupt v. Abram,* 352 U.S. 432, 439 (1957) (taking blood from prisoner); *Jacobson v. Massachusetts,* 197 U.S. 11 (1905) (vaccination); *Union Pacific R. Co. v. Botsford,* 141 U.S. at 251-52 (physical examination).[4]

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[4] *Accord, Doe v. Taylor Independent School District,* 15 F.3d 443, 445 (5th Cir.) (en banc) (sexual molestation of student by teacher; "liberty interest in their bodily integrity"), *cert. denied sub nom. Lankford v. Doe,* ___ U.S. ___, 115 S. Ct. 70, 130 L. Ed.2d 25 (1994); *Sepulveda v. Ramirez,* 967 F. 2d 1413, 1415-16 (9th Cir. 1992) (parolee's right of privacy while providing urine sample), *cert. denied,* 510 U.S. 931 (1993); *Dang Vang v. Vang Xiong X Toyed,* 944 F. 2d 476, 478-79 (9th Cir. 1991) (rape of refugee by state employment officer); *Stoneking v. Bradford Area School District,* 882 F.2d 720, 726-27 (3rd Cir. 1989) (sexual assault upon student by teacher; "clearly established constitutional right . . . to be free from sexual abuse"), *cert. denied,* 493 U.S. 1044 (1990); *Garcia v. Miera,* 817 F.2d 650, 655 (10th Cir. 1987) (paddling of student), *cert. denied,* 485 U.S. 959 (1988); *Jefferson v. Ysleta Independent School District,* 817 F.2d 303, 305 (5th Cir. 1987) (physical restraint of school student infringed upon her "bodily integrity" – her "right to be free from bodily restraint"); *Clark v. Taylor,* 710 F.2d 4, 8-9, 11 (1st Cir. 1983) (application of chemical solution to prisoner's skin to test for otherwise-undetectable blood); *United States v. Davila,* 704 F. 2d 749 (5th Cir. 1983) (affirming conviction under 18 U.S.C. § 242 of border patrol officers who coerced illegal immigrants into sexual intercourse); *Milonas v. Williams,* 691 F.2d 931, 942 (10th Cir. 1982) (seizing child's hair as part of school's disciplinary ritual), *cert. denied,* 460 U.S. 1069

Second, the conduct proved here by Plaintiff Skinner unquestionably parallels that found in other cases to exceed mere offense to "some fastidious squeamishness or private sentimentalism," but rather "to offend even hardened sensibilities." *Rochin v. California*, 342 U.S. 165, 172, 174 (1952) (pumping prisoner's stomach). *See Harrington v. Almy*, 977 F.2d 37, 43-44 (1st Cir. 1992) (performing penile test as condition of reinstatement of police officer accused of child abuse); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) (abandoning owner of impounded car in high crime area), *cert. denied*, 498 U.S. 938 (1990); *Shillingford v. Holmes*, 634 F.2d 263, 266 (5th Cir. 1981) (excessive force by police officer may "transcend the bounds of ordinary tort law and establish a deprivation of constitutional rights"); *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (excessive paddling in school may be "so

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(1983); *Rogers v. Okin*, 634 F.2d 650, 653 (1st Cir. 1980) (administration of drugs at mental health facility implicated the "penumbral right to privacy, bodily integrity, or personal security"), *vacated on other grounds*, 457 U.S. 291 (1982); *Shillingford v. Holmes*, 634 F. 2d 263, 265 (5th Cir. 1981) (police officer struck tourist photographing an arrest; "state-occasioned damage to a person's bodily integrity"); *Hall v. Tawney*, 621 F.2d 607, 611 (4th Cir. 1980) (paddling at school implicates "the right to be free of state intrusions into realms of personal privacy and bodily security"); *Holsapple v. Woods*, 500 F.2d 49, 51-52 (7th Cir.) (forcing child to cut hair), *cert. denied*, 419 U.S. 901 (1974); *Runnels v. Rosendale*, 499 F.2d 733, 735 (9th Cir. 1974) (operation on prisoner); *York v. Story*, 324 F. 2d 450, 454-55 (9th Cir. 1963) (requiring assault victim to be photographed naked), *cert denied*, 376 U.S. 939 (1964). Contrary to the court of appeals' suggestion (6a-7a), these rights enjoy constitutional protection whether or not they are also protected by state tort law. *See Zinermon v. Burke*, 494 U.S. 113, 124-25 (1990); *Wilson v. Garcia*, 471 U.S. 261, 279 (1985).

brutal, demeaning, and harmful as literally to shock the conscience of the Court"); *White v. Rochford*, 592 F.2d 381, 386 (7th Cir. 1979) (police officer's abandonment of small children on highway after arresting the driver was "conduct so clearly deserving of universal reprobation"); *Johnson v. Glick*, 481 F.2d 1028, 1033 (2nd Cir.) (excessive punishment of prisoner), *cert. denied sub nom. Employee-Officer John, # 1765 Badge Number v. Johnson*, 414 U.S. 1033 (1973), *disapproved on other grounds, Graham v. Connor*, 490 U.S. 386 (1989).

In the instant case, given the jury's finding, which the court of appeals did not disturb, that the fire fighters' conduct was the product of the City's custom, practice or policy (the evidence of which is summarized by the dissent at 12a), the facts found by the jury did constitute a violation of Plaintiff Skinner's substantive due process rights, and thus of § 1983. That is precisely why the City never contested this element of the plaintiff's cause of action, and in fact stipulated that proof of official complicity indeed would warrant a verdict for the plaintiff.

2. *The Court of Appeals Erred in Excusing the City's Stipulation that a Constitutional Violation Took Place.* The court of appeals' decision is particularly troubling because it excuses the City's stipulation, of which the jury was informed, that the plaintiff's evidence of his fellow fire fighters' conduct indeed made out a constitutional violation, if that conduct was attributable to the City. Although there are circumstances in which this Court, and by implication an appellate court, will consider de novo (sometimes sua sponte) a pure question of law, this was not such a case.

Typically the Court declines to consider arguments not raised below or in the parties' submissions[5], especially in the face of a stipulation by the losing party.[6] This principle applies to any contention which would warrant judgment for either party. The absence of a motion for directed verdict at the close of the evidence, renewed post-trial, waives any entitlement to judgment[7]; and the available bases for such a judgment are limited to those raised with specificity by the moving party.[8] This applies to constitutional questions no less than any others; even fundamental constitutional claims can be waived.[9] Thus

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[5] *See United States v. Burke*, 504 U.S. 229, 112 S. Ct. 1867, 119 L. Ed.2d 34, 41 n. 1 (1992); *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195 n. 2 (1989); *Stone v. Powell*, 428 U.S. 465, 481 n. 15 (1976); *State of Tennessee v. Dunlap*, 426 U.S. 312, 316 n. 3 (1976); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 215 (1976).

[6] *See United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed.2d 508, 519 (1993); *Steagald v. United States*, 451 U.S. 204, 211 (1981).

[7] *Johnson v. New York, New Haven & Hartford R. Co.*, 344 U.S. 48, 50 (1952); *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 573-74 (1948); *Cone v. West Virgina Pulp & Paper Co.*, 330 U.S. 212, 218 (1947); *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913).

[8] *See Malta v. Schulmerich Carillons, Inc.*, 952 F.2d 1320, 1324 (Fed. Cir. 1991), *cert. denied*, 504 U.S. 974 (1992); *Austin-Westshore Construction Co. v. Federated Department Stores, Inc.*, 934 F.2d 1217, 1222 (11th Cir. 1991); *Meriwether v. Coughlin*, 879 F.2d 1037, 1043 (2d Cir. 1989); *Kutner Buick, Inc. v. American Motors Corp.*, 868 F.2d 614, 617 (3rd Cir. 1989); *Lifshitz v. Walter Drake & Sons, Inc.*, 806 F.2d 1426, 1429 (9th Cir. 1986); *Sulmeyer v. Coca-Cola Co.*, 515 F.2d 835, 846 n. 17 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

[9] *See Duncan v. Henry*, 513 U.S. ___, 115 S. Ct. 887, 130 L. Ed.2d 865, 868 (1995); *United States v. Alvarez-Sanchez*, 511 U.S.

in *City of Canton v. Harris*, 489 U.S. 378, 386 n. 5 (1989), the plaintiff could not defend a § 1983 judgment, which was based at trial on a failure-to-train theory, on the alternative theory that the violation was a product of custom and practice, because the argument was raised for the first time on appeal.

At the same time, however, the Court has long recognized the doctrine of plain error, permitting it to address new issues in order to prevent a manifest injustice affecting the integrity of the process, if their resolution is beyond any doubt.[10] The Court has done so only in addressing pure issues of law[11] – even (we must admit) in

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350, 114 S. Ct. 1599, 128 L. Ed.2d 319, 329 n. 5 (1994); *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed.2d 508, 517 (1993); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 237 (1990); *Heckler v. Campbell*, 461 U.S. 458, 468-69 n. 12 (1983).

[10] *See United States v. Young*, 470 U.S. 1, 15 (1985); *Connor v. Finch*, 431 U.S. 407, 421 n. 19 (1977); *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *Washington v. Davis*, 426 U.S. 229, 238 & n. 9 (1976); *Vachon v. New Hampshire*, 414 U.S. 478, 479 n. 3 (1974); *Silber v. United States*, 370 U.S. 717, 718 (1962); *Turner v. City of Memphis*, 369 U.S. 350, 353-54 (1962); *Hormel v. Helvering*, 312 U.S. 552, 557 (1941); *United Brotherhood of Carpenters & Joiners of America v. United States*, 330 U.S. 395, 412 (1947).

[11] *See Elder v. Holloway*, 510 U.S. 510, 114 S. Ct. 1019, 127 L. Ed.2d 344, 348-51 (1994); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n. 8 (1991); *Kamen v. Kemper Financial Services*, 500 U.S. 90, 97 n. 4 (1991); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n. 23 (1982); *Glidden Co. v. Zdanok*, 370 U.S. 530, 535-36 (1962); *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). *See also United States v. Burke*, 504 U.S. 229, 112 S. Ct. 1867, 119 L. Ed.2d 34, 50 (1992) (Scalia, J, concurring).

the face of a stipulation by the parties below[12] – although the same reasoning probably would apply in proper cases to mixed questions of law and fact, which also are reviewable de novo.[13]

In contrast, appellate review of a fact-based question is not de novo[14]; and as the Court has recognized, it is inappropriate to resolve a fact-dependent question for the first time on appeal, thus depriving the opposing party of the opportunity to develop evidence on the point, and to argue to the factfinder any inferences or nuances inherent in that evidence.[15] As we have noted, although the elements of substantive due process present a question of law, their application in a given case is quintessentially fact-specific, dependent upon the twin questions whether the defendant's conduct has implicated the "right of an individual that his person be held inviolable," *Breithaupt*

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[12] *See Lebron v. National R. Passenger Corp.*, 513 U.S. ___, 115 S. Ct. 961, 130 L. Ed.2d 902, 910 (1995); *Heller v. Doe*, 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed.2d 257, 269-70 (1993); *United States National Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 113 S. Ct. 2173, 124 L. Ed.2d 402, 413 (1993); *Estate of Charles Henry Sanford v. Commissioner of Internal Revenue*, 308 U.S. 39, 51 (1939).

[13] *See Pullman-Standard v. Swint*, 456 U.S. 273, 289 n. 19, 291 (1982); *Bogardus v. Commissioner*, 302 U.S. 34, 39 (1937); *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 490-91 (1937).

[14] *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 576 (1985); *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982); *Commissioner v. Duberstein*, 363 U.S. 278, 290-91 (1960); *Commissioner v. Heininger*, 320 U.S. 467, 475 (1943).

[15] *See Heller v. Doe*, 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed.2d 257, 269-70 (1993); *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982).

v. Abram, 352 U.S. 432, 439 (1957), or amounts to "conduct that shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952). Although this Court has not spoken directly to the question, the appellate decisions recognize that both tests present questions of fact for the jury.[16]

Moreover, even if the issue were considered a mixed question of law and fact, the doctrine of plain error is available only to correct an uncontrovertible error which threatens the integrity of the process, *see supra* note 10 – and that means more than an error affecting the outcome of the proceeding. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989). It means an error which is not only fundamental but "plain" – that is, about which there can be no dispute. *See United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed.2d 508, 519 (1993); *McCormick v. United States*, 500 U.S. 257, 268 n. 6 (1991). Therefore, if there is any room for doubt that the fire fighters' conduct in this case, assuming that it is attributable to the City, violated Herman Skinner's constitutional rights, the doctrine of plain error was unavailable to the appellate court.

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[16] *See, e. g., Fagan v. City of Vineland*, 22 F.3d 1296, 1307-09 (3rd Cir. 1994); *Harrington v. Almy*, 977 F.2d 37, 44 (1st Cir. 1992); *Temkin v. Frederick County Commissioners*, 945 F.2d 716, 724 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992); *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986); *Johnson v. Glick*, 481 F.2d 1028, 1033 (2nd Cir.), *cert. denied sub nom. Employee-Officer John, #1765 Badge Number v. Johnson*, 414 U.S. 1033 (1973), *disapproved on other grounds, Graham v. Connor*, 490 U.S. 386 (1989). As we noted, in *City of Canton v. Harris*, 489 U.S. 378, 386 n. 5 (1989), the Court declined to consider an alternative theory of § 1983 liability for the first time, thus at least implicitly acknowledging its fact-based context.

As we demonstrated in the previous sub-section, at the least there is room for doubt.

In the context of these principles, the court of appeals' decision to relieve the City of its explicit stipulation that its fire fighters' conduct, if attributable to the City, did amount to a constitutional transgression, is troubling – particularly when juxtaposed against that court's casual discard of the plaintiff's longstanding Fourth Amendment theory on the ground that it somehow was abandoned at oral argument (5a). In light of the authorities above, we believe the court erred in concluding that the issue was only one of law (9a), and that to hold the City to its stipulation "would result in a miscarriage of justice – especially when a $1.3 million verdict is at issue" (9a). No authority is cited for this conclusion, which would extend the plain error doctrine to any case in which a losing defendant may have been entitled to a directed verdict but forgot to ask for one. That is clearly an overextension of the doctrine.[17]

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[17] If the Court accepts jurisdiction, we will also challenge the appellate court's dismissal, in a single shrug of a sentence, of the plaintiff's Fourth Amendment claims. They were from the outset a significant aspect of the plaintiff's case; they were a basis for the jury's verdict; and their dismissal by the appellate court as waived at oral argument (5a) at the least is ironic, given that court's forgiveness of the City's explicit concession of the majority's rationale for reversal. As we will establish, there was no waiver.

CONCLUSION

On the basis of the foregoing, it is respectfully submitted that a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

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Herman SKINNER, Plaintiff-Appellee,

v.

CITY OF MIAMI, FLORIDA,
Defendant-Appellant,

Charles V. Boyd, Osvaldo Iglesias, Michael S. Whittington, Pedro Gomez, Charles K. McDermott, Colonel H. Duke, Defendants.

No. 93-4324.

United States Court of Appeals,
Eleventh Circuit.

Aug. 25, 1995.

Charles C. Mays, Asst. City Atty., Kathryn S. Pecko, Asst. City Atty., Miami, FL, for appellant.

Irving M. Miller, Susan Eisenberg, Miami, FL, for appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, BLACK, Circuit Judge, and KAUFMAN*, Senior District Judge.

TJOFLAT, Chief Judge:

The City of Miami (the "City") appeals a $1.3 million verdict based on liability under 42 U.S.C. section 1983. Herman Skinner, a fire fighter, sued the City for injuries he sustained from a hazing incident. Because Skinner is

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*Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

unable to prove a violation of a right secured by the United States Constitution or federal law, we reverse the district court's denial of the City's motion for judgment as a matter of law.

I.

The facts giving rise to this lawsuit are not in dispute. Herman Skinner, Charles V. Boyd, Osvaldo Iglesias, Michael S. Whittington, Pedro Gomez, and Charles K. McDermott were fire fighters employed by the City of Miami. With the exception of Skinner, the fire fighters were assigned to Fire Station No. 3. Skinner, who was assigned to Fire Station No. 4, was temporarily assigned to Fire Station No. 3 on the morning of December 9, 1989, as he had been between five and ten times before. During those prior assignments, Skinner developed a sense of camaraderie with the other fire fighters, which included engaging in joking, singing, and wrestling. For example, Skinner once jokingly placed his arm around Iglesias' neck and told Iglesias that "he looked good, and that if the two were stranded on an island together, Skinner would make Iglesias his woman."

When Skinner reported to Station No. 3 on the morning of December 9, the other fire fighters were asleep. Charles Boyd warned Skinner that "if you don't get out of here with all this loud noise, we are going to get you when we wake up." The day proceeded uneventfully with several of the fire fighters discussing a local high-profile criminal trial and singing a song.

After the singing ended, while Skinner sat in a chair and watched television, Boyd and Iglesias, assisted by

McDermott and Whittington, approached him from behind and wrestled him to the floor. Handcuffs were applied to Skinner's wrists while he was on the floor. As Skinner was on the floor handcuffed, Boyd, who was naked, straddled Skinner's chest, grabbed Skinner's head, and rubbed his scrotum over the top of Skinner's head. Everyone present laughed except for Skinner, who demanded that the handcuffs be removed.

When the handcuffs were removed, Skinner chased Boyd. Skinner caught Boyd, but eventually walked back into the room holding Boyd's arm. Later, Skinner retaliated by grabbing Boyd's testicles causing Boyd to cry and scream. Three fire fighters eventually pulled Skinner away from Boyd. Skinner also attempted to bite Gomez's nipple and bent Iglesias' finger backwards.

On January 23, 1990, Skinner filed suit against the City of Miami, the Chief of the Fire Department (the "Chief") in his official capacity, and numerous fire fighters. Skinner asserted liability for violations of the Fifth and Fourteenth Amendments under section 1983 and pendent state law claims. On April 24, 1990, Skinner filed an amended complaint suing the City, the Chief in his individual and official capacities, and the fire fighters in their individual and official capacities, alleging violations of his Fourth, Fifth, and Fifteenth Amendment rights, as well as pendent state law claims. Specifically, Skinner alleged that the City "has a custom or policy of authorizing its fire fighters to engage in horseplay and hazing which exceeds the bounds of good taste and safety and is destructive to the morale of minority fire fighters and is so extreme that it violates certain rights secured to said persons by the constitution and laws of

the United States." Record, vol. 1, at 4, No. 29. Skinner alleged that the City's practices violated the Fourth, Fifth, and Fourteenth Amendments, which "prohibit the use of excessive and unreasonable force; prohibit the deprivation of liberty without due process of law; and provide freedom from summary punishment." Record, vol. 1, at 7-8, No. 29.

Discovery ensued, and the individual fire fighters filed a host of counterclaims. Skinner reached confidential cash settlements with the individual fire fighters prior to trial. The City and Chief moved for summary judgment contending that Skinner had not been subjected to injuries under color of law and that the City and Chief did not unconstitutionally train, supervise, and discipline fire fighters. The district court denied the motion. The case was tried for five days (December 21, 1992 through December 30, 1992) before a jury. At the close of plaintiff's case, the City and Chief moved for judgment as a matter of law on the bases that plaintiff failed to prove any custom, practice, or policy or that the fire fighters were acting under color of law. Record, vol. 8, at 40, No. 236. The district court granted the motion as to the Chief, in both his individual and official capacities, but denied it as to the City. The jury returned a verdict in the amount of $1.3 million. The district court denied the City's motions for judgment as a matter of law, and in the alternative, for a new trial, and entered final judgment. This appeal followed.

II.

Section 1983 states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. "[Section] 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.' " *Graham v. Connor*, 490 U.S. 386, 393-94, 109 S.Ct. 1865, 1870, 104 L.Ed.2d 443 (1989) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n. 3, 99 S.Ct. 2689, 2695 n. 3, 61 L.Ed.2d 433 (1979)). To succeed, a section 1983 plaintiff must show a violation of a right secured by federal law.

Skinner alleged in his amended complaint violations of the Fourth, Fifth, and Fourteenth Amendments. At oral argument, Skinner's counsel acknowledged that there had been no Fourth Amendment violation. We are left with a substantive due process claim.[1] The substantive element of the Due Process Clause protects those rights that are "fundamental" – rights that are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S.

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[1] The Due Process Clause of the Fourteenth Amendment states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). The Supreme Court has deemed that most, but not all, of the rights enumerated in the Bill of Rights are fundamental. Certain unenumerated rights, such as the right to privacy, also merit protection. *See, e.g., Planned Parenthood v. Casey*, ___ U.S. ___, ___, 112 S.Ct. 2791, 2807, 120 L.Ed.2d 674 (1992).

Although the Supreme Court has extended substantive due process protection to certain unenumerated rights, it has not extended Fourteenth Amendment coverage to many areas. Tort law is one such area that remains largely outside the scope of substantive due process jurisprudence. *Daniels v. Williams*, 474 U.S. 327, 332, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986) (noting that the Due Process Clause "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society"); *Wright v. Lovin*, 32 F.3d 538, 540 (11th Cir.1994). "[S]ubstantive rights . . . created *only* by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process Clause because 'substantive due process rights are created only by the Constitution.' " *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir.1994) (en banc) (emphasis added) (quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229, 106 S.Ct. 507, 515, 88 L.Ed.2d 523 (1985) (Powell, J., concurring)), *cert. denied*, ___ U.S. ___, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995).

> [T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-

> ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Collins v. City of Harker Heights, 503 U.S. 115, 125, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261 (1992) (citation omitted). Skinner has proven that he was assaulted – that, however, is a tort created by state law, and not necessarily a violation of a constitutional right.[2] Skinner has failed to show a violation of any right secured by federal law either under the Constitution or a federal statute.

Skinner argues that we should not consider the issue of a constitutional violation because it was not raised by the City in the district court or on appeal. Minimal attention was paid to the issue of a constitutional violation in the district court.[3] Although as a general rule, an

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[2] The record does not support the dissent's implication that the City committed any deliberate acts to injure Skinner. At most, the evidence suggests that certain fire department officials knew that hazing incidents had occurred at some points in the past. This, however, falls short of demonstrating that the City violated a substantive constitutional right.

[3] This treatment is exemplified by the imprecise and scattered manner in which the district court instructed the jury on Skinner's constitutional claims:

> Plaintiff, Herman Skinner, has alleged that the defendant, the City of Miami, has deprived him of his constitutionally guaranteed right to be free from unreasonable seizures or physical abuse.
>
> You, the jury, are instructed that Title 42 U.S.C. Section 1983 provides a federal remedy for the deprivation of rights, privileges, or immunities

appellate court will not consider a legal issue or theory raised for the first time on appeal, *Lattimore v. Oman*

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secured by the Constitution or the law of the United States.

Instruction No. 8A, Record, Vol. 3, at 12, No. 180.

In order to determine whether a plaintiff can recover from a defendant under 42 U.S.C. Section 1983 for deprivation of his constitutionally guaranteed rights to be free from unlawful seizure or physical abuse, you would have to determine whether such deprivation occurred. However, the parties have agreed that said seizure and physical abuse did occur.

Specifically, Herman Skinner claims that five fire fighters while acting under color of authority of the State of Florida as members of the Fire and Rescue and Inspection Services Department of the City of Miami made an unprovoked attack upon Plaintiff in violation of his constitutional rights. It is alleged that these fire fighters intentionally violated Skinner's constitutional rights including the right to be free from the use of excessive and unreasonable force, physical abuse and the right not to be deprived of his liberty without due process of law. Plaintiff alleges that the City of Miami is liable for this constitutional deprivation because the actions of these fire fighters were permitted to occur because of customs, practices or policies of the City of Miami Fire Department which reflect a deliberate indifference to the rights of persons employed as fire fighters.

Instruction No. 8B, Record, Vol. 3, at 13, No. 180.

In order to prove his claim, Herman Skinner must prove by a preponderance of the evidence each of the following facts:

Constr., 868 F.2d 437, 439 (11th Cir.1989) (per curiam), we have discretion to do so if the new issue or theory "involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice," *United States v. Southern Fabricating Co.*, 764 F.2d 780, 781 (11th Cir.1985) (per curiam) (quotation omitted). Whether a constitutional violation has occurred is a question of law and the refusal to consider it would result in a miscarriage of justice – especially when a $1.3 million verdict is at issue. The issue, moreover, was not ignored entirely during the proceedings below. When discussing proposed jury instructions, counsel for the City did object to proposed wording and acknowledged that "in order for [plaintiff] to have a [section] 1983 case, you [must] have a right that exists under the Federal constitution or [under a] Federal statute." Record, Vol. 8, at 301.

We have given the parties ample opportunity to be heard on the subject, both at oral argument and through supplemental briefing. At no time has Skinner been able to point to any authority demonstrating that he has suffered a constitutional deprivation as opposed to a state law tort. The cases he relies on arose in the custodial setting and are inapposite.[4] *See, e.g., Cannon v. Macon*

> 1) that the fire fighters intentionally committed acts which violated one or more of Skinner's constitutional rights previously mentioned. . . .

Instruction No. 8C, Record, Vol. 3, at 14, No. 180.

[4] At oral argument, Skinner relied on *MacDowell v. Manchester Fire Dep't*, 769 F.Supp. 40 (D.N.H.1990), for the proposition that a government employee owes a co-worker a *constitutional* duty not to engage in harassing behavior. Our review of that case does not support such a reading, nor could we find any case to support such a proposition.

County, 1 F.3d 1558 (11th Cir.1993); *Douthit v. Jones*, 619 F.2d 527 (5th Cir.1980).[5] We, therefore, must conclude that although Skinner was the victim of a state law tort, he has not shown a constitutional violation. Consequently, he is not entitled to relief under section 1983.

We REVERSE and REMAND this case to the district court for entry of judgment in accordance with the City's motion for judgment as a matter of law.

IT IS SO ORDERED.

FRANK A. KAUFMAN, Senior District Judge, dissenting:

Chief Judge Tjoflat cites to and quotes from *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). In *Collins*, Justice Stevens, after noting the difference between "(1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the City is responsible for that violation", 503 U.S. at 120, 112 S.Ct. at 1065-66, analyzed the first issue in terms of substantive due process and quoted from *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989), (quoting *Davidson v. Cannon*, 474 U.S. 344, 348, 106 S.Ct. 668, 670-71, 88 L.Ed.2d 677 (1986)), that substantive due process is only violated when government involves itself in "abusing [its] power, or employing it as an instrument of oppression" or when "an omission can . . . properly be

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[5] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

characterized as . . . arbitrary or conscience-shocking, in a constitutional sense", rather than in the context of "a fairly typical state law tort claim." 503 U.S. at 126-28, 112 S.Ct. at 1069-70. That approach by Justice Stevens would appear fully in line with the standard in *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), adopted in cases such as *McKinney v. Pate*, 20 F.3d 1550, 1556, n. 7 (11th Cir.1994), and *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1500 (11th Cir.1985), *cert. denied*, 476 U.S. 1115, 106 S.Ct. 1970, 90 L.Ed.2d 654 (1986).[1] In *Gilmere* at 1500-01, Judge Vance quoted Judge Friendly's observations in *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973):

> Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights. In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Johnson v. Glick took place in a prison setting. In the majority opinion, Judge Tjoflat distinguishes prison cases on the grounds that matters which arise in a custodial setting are hardly fully applicable in an employment,

---

[1] But see the reservations as expressed by Judge Tjoflat's separate opinion, joined in by Judges Roney and Fay, in *Gilmere* at 1511, n. 21; see also *McKinney* at 1556, n. 7.

non-custodial setting of the type set forth in the within case. I fully agree. However, that does not mean that substantive due process provides no protection for persons in the position of Skinner in a state employment situation. Rather, the test set forth in *Collins*, which itself involved an employment relationship and not a custodial setting, still remains fully applicable in a case such as this case.

An examination of the record in this case discloses that Skinner presented considerable evidence showing a long standing custom and practice of unfettered hazing by fellow employees, on a number of occasions, including group attacks upon a single fire fighter who had been recently promoted or married, or the like. Such evidence includes incidents during which four or five fire fighters held a fire fighter selected as their victim, while one or more other fire fighters painted the genitals of the victim and other fire fighters looked on, having, in one or more instances, been alerted by announcement over the loudspeaker system within the firehouse that the event was about to take place. There was, in addition, evidence that such occurrences had become sufficiently traditional, to have caused special vocabulary to be developed. The so called "three man lift" were words used with regard to the type of occurrence described *supra*. The words "red assing" were employed generally to describe a certain form of hazing. The evidence also was rather specific concerning the knowledge of such practices held by the Chief of the Fire Department and by other responsible officials of that department and that such officials had, at most, ineffectually attempted to stop the practices. Such evidence falls within the standards adopted by the

Supreme Court in *Collins*, 503 U.S. at 126, 112 S.Ct. at 1069, of abuse of power, and actions which constitute oppressive behavior by superiors in permitting fellow employees to engage in the same, and also adds up to "conscience shocking" behavior exceeding the typical state law tort claim on behalf of one employee against one or more other employees of the State. Further, such practices were permitted to continue over a long period of time and fell beyond the single type of "push or shove" occurrence referred to by Judge Friendly in *Johnson v. Glick*, at 1033.[2] Nor do such practices constitute the kind of behavior which governmental officials may ignore without liability. See, by way of contrast, *Lovins v. Lee*, 53 F.3d 1208 (11th Cir.1995), in which governmental officials were held non-liable for rape by a violent criminal allegedly, wrongfully released on a temporary pass from prison.

In his majority opinion, the Chief Judge has written[3]: "The record does not support the dissent's implication that the City committed any deliberate acts to injure Skinner. At most, the evidence suggests that certain fire department officials knew that hazing incidents had occurred at some points in the past. This, however, falls

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[2] *MacDowell v. Manchester Fire Dep't.*, 769 F.Supp. 40 (D.N.H.1990), relied on by Skinner and discussed by Judge Tjoflat, *see* n. 3 of the majority opinion, may well have only involved such a single type of event; accordingly its authority may be questionable.

[3] See n. 2 of the majority opinion.

short of demonstrating that the City violated a substantive constitutional right". I respectfully disagree. A deliberate act to injure on the part of the City of Miami is not necessary to establish liability pursuant to § 1983. Rather, a municipality may be subject to § 1983 liability if plaintiff establishes "a widespread practice that, 'although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a 'custom or usage' with the force of law,' (citations omitted). In other words, a longstanding and widespread practice is deemed authorized by the policymaking officials because they must have known about it but failed to stop it." *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1481 (11th Cir.1991).[4] In the within case, there is quite a bit of

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[4] *See also Church v. City of Huntsville*, 30 F.3d 1332, 1345-1347 (11th Cir.1994); *Brooks v. Scheib*, 813 F.2d 1191, 1193 (11th Cir.1987) ("(a) municipality's failure to correct the constitutionally offensive actions of its police department may rise to the level of a 'custom or policy' if the municipality tacitly authorizes these actions or displays deliberate indifference towards the police misconduct (citations omitted))"; *Depew v. City of St. Mary's*, 787 F.2d 1496, 1499 (11th Cir.1986). Authority to the same effect also emanates from other Circuits; *see, e.g., McNabola v. Chicago Transit Authority*, 10 F.3d 501, 511 (7th Cir.1993) (quoting from the Eleventh Circuit's opinion in *Brown*); *Bordanaro v. McLeod*, 871 F.2d 1151, 1157 (1st Cir.), *cert. denied*, 493 U.S. 820, 110 S.Ct. 75, 107 L.Ed.2d 42 (1989); *Spell v. McDaniel*, 824 F.2d 1380, 1386-87 (4th Cir.1987), *cert. denied*, 484 U.S. 1027, 108 S.Ct. 752, 98 L.Ed.2d 765 (1988). Individual liability, as contrasted with liability pursuant to *Monell v. Dep't of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), can also stem from such omissions. *See Swint v. City of Wadley*, 51 F.3d 988, 999 (11th Cir.1995), involving an arrest, not an employment setting. But that distinction, as discussed *supra* in the body of this dissent, does not, in my view, adversely affect

evidence of just such a failure to stop a known, widespread practice, and also of the fact that there were scattered ineffectual attempts to curtail that practice. Those ineffectual attempts support the verdict of the jury in favor of the plaintiff – they do not undermine it.

In his majority opinion, Judge Tjoflat writes "[m]inimal attention was paid to the issue of a constitutional violation in the district court", and refers to the fact that the district court simply instructed the jury that Skinner had claimed denial of his "constitutionally guaranteed right to be free from unreasonable seizures or physical abuse." See n. 2 in the majority opinion, along with parts of the record setting forth the jury instructions relating to the roles played by responsible officials of the City of Miami. Certainly it would have been better for the trial judge to have utilized the standards enunciated by Justice Stevens in *Collins* and by Judge Friendly in *Johnson v. Glick*. But the record does not disclose that defendants-appellants specifically requested such instructions, or even, in general, requested the inclusion of the same in the jury instructions. Under the circumstances, it would appear that the jury instructions were not so lacking in compliance with applicable legal standards so as to require a new trial in order to avoid a miscarriage of justice.

That is particularly true in this case in which, from my point of view, there is more than ample evidence to sustain the jury's verdict and to support affirmative

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the application herein of a combination of the standards of *Collins* and *Monell* so as to require anything other than affirmance of the judgment below.

answers by the jury to the two discrete questions posed by *Collins*, namely that (1) "plaintiff's harm was caused by federal constitutional violation", and (2) "The City is responsible for that violation." *Collins*, 503 U.S. at 120, 112 S.Ct. at 1066.

For the reasons set forth in this separate opinion, I respectfully dissent and would affirm the judgment of the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-4324

HERMAN SKINNER,

versus

Plaintiff-Appellee,

CITY OF MIAMI, FLORIDA,

Defendant-Appellant,

CHARLES V. BOYD, OSVALDO IGLESIAS, MICHAEL S. WHITTINGTON, PEDRO GOMEZ, CHARLES K. MCDERMOTT, COLONEL H. DUKE,

Defendants.

On Appeal from the United States District Court for the Southern District of Florida

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(Filed June 25, 1996)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion August 25, 11th Cir., 1995, ___ F.2d ___).

Before: TJOFLAT, Chief Judge, BLACK, Circuit Judge and KAUFMAN*, Senior District Judge.

PER CURIAM:

---

*Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 90-0211-CIV-MORENO

HERMAN SKINNER,

Plaintiff,

vs.

CITY OF MIAMI,

Defendant.

_____/

FINAL JUDGMENT ORDER

(Filed Dec. 30, 1992)

THIS CAUSE came before the Court upon the action of HERMAN SKINNER vs. CITY OF MIAMI. The jury considered the evidence, heard the argument of counsel, and returned a verdict in favor of PLAINTIFF HERMAN SKINNER in the amount of $1,300,000 pursuant to the attached jury verdict form. Accordingly, it is

ADJUDGED that Final Judgment is entered in favor of the Plaintiff, in the amount of $1,300,000. Costs in this case shall be taxed at a later date upon appropriate motion.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of December, 1992.

/s/ Federico A. Moreno
UNITED STATES DISTRICT JUDGE
FEDERICO A. MORENO

copies provided:

Irving M. Miller, Esq.
Charles C. Mays, Esq.

(2)

Supreme Court, U.S.
FILED
NOV 14 1996
CLERK

No. 96-388

In The

Supreme Court of the United States

October Term, 1996

HERMAN SKINNER,

Petitioner,

vs.

CITY OF MIAMI, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S RESTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE COURT OF APPEALS CORRECTLY CONCLUDED THAT PLAINTIFF DID NOT SUFFER A CONSTITUTIONAL DEPRIVATION AND THAT THE CITY WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

II.

WHETHER THE COURT OF APPEALS IS BOUND BY AN ERRONEOUS "STIPULATION" ON A PURE QUESTION OF LAW.

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RESPONSE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondent, Defendant/Appellant below, City of Miami, Florida, respectfully requests the Court to deny the petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit filed by Petitioner, Plaintiff/Appellee below, Herman Skinner. In this Response in Opposition to Petition for Writ of Certiorari, the parties will be referred to by name or as they appeared before the District Court.

The instant case is not the civil counterpart of *United States v. Lanier*, 73 F. 3d 1380 (6th Cir.), *cert. granted*, ___ U.S. ___, 116 S.Ct. 2522, 135 L.Ed.2d 1047 (June 17, 1996) for reasons discussed *infra*. Rather, this case merely adhered to the well-established principle that claims for incidents between co-workers based on rights that are grounded on state law will not be elevated constitutional proportions.

STATEMENT IN OPPOSITION TO JURISDICTION

Section 1254(1) of Title 28 of United States Code provides that the Supreme Court may review cases in the courts of appeal by "writ of certiorari upon the petition of any party. . . . " However, it is respectfully submitted that the Court of Appeals' decision does not create inter-circuit conflict, conflict with relevant decisions of this Court, or decide an important question of federal law that has not been, but should be, settled by this Court. *See* Sup.Ct.R. 10(a), (c).

STATEMENT OF THE CASE

This litigation was filed as a result of a spontaneous incident that occurred at a City of Miami fire station and involved Plaintiff and five fellow firefighters. There is no dispute that this incident occurred and no one is happy about it. Four of the five firefighters were fired, the fifth one received a 480 hour suspension. In accordance with the provisions of their collective bargaining agreement, the firefighters grieved this discipline and were ultimately ordered back to work by the arbitrator.[1] As to the instant case, the City's liability has been hotly contested; it did not defend the individual firefighters, who ultimately settled with Plaintiff from their own resources before the case went to trial.

A. The Material Facts.

As the Court of Appeals recognized, the facts giving rise to the incident in question are not in dispute. The material facts surrounding this incident are set forth in the Court of Appeals' opinion, appended hereto at 1a-16a, and will not be reiterated here. While Plaintiff's statement of the case is generally accurate, the problem is more with what was not stated, as opposed to what was stated.

Plaintiff told the perpetrators later the night of the incident that they could lose their jobs and go to jail for

---

[1] Under Florida law and the provisions of the collective bargaining agreement, the arbitrator's decision is final and binding except in very limited circumstances. *See* §§682.13 and 682.14, Fla. Stat. (1991).

what they had done to him. Three days later, when contacted by fire department officials about this incident, Plaintiff continued to recognize that the perpetrators could be fired because he lied to the investigators. He told them that it was an "unfounded rumor." After the interview, Plaintiff called one of the perpetrators to warn him that a fire department official was on his way to talk to him, and assured him that Plaintiff did not tell anything about the incident to the official. Plaintiff waited another three days before he changed his mind and recanted his earlier lie. An investigation immediately ensued.

Plaintiff and the five firefighters who perpetrated this incident were all members of the classified ranks in the Fire Department. Not one of the individuals that perpetrated this incident was clothed with real or pretended authority to engage in the complained of activity.

B. District Court Proceedings

Plaintiff filed this lawsuit against the City, the fire chief and the five perpetrators on January 23, 1990, less than two months after the incident. Throughout this litigation, Plaintiff's allegations regarding the actual constitutional violations he purportedly suffered have been nebulous. In the First Amended Complaint, the complaint upon which the case was tried, Plaintiff alleged that the district court's jurisdiction vested, *inter alia*, because the case was "brought pursuant to 42 U.S.C. §§1983 and 1988, and the Fourth, Fifth and Fourteenth Amendments of the United States Constitution." (R. 1 – 29 – 2). Plaintiff denominated Count I as "Deprivation of Liberty Without

Due Process of Law," but in that regard, merely alleged that

> Defendants' unconstitutional practices . . . deprived Plaintiff of his constitutional rights as secured by the Fourth, Fifth and Fourteenth Amendments . . . which: (a) prohibit the establishment and maintenance of a racially discriminatory and racially harassing working environment; (b) prohibit the use of excessive and unreasonable force; (c) prohibit the deprivation of liberty without due process of law; and (d) provide freedom from summary punishment. (R. 1 – 29 – 7-8).[2]

In Count II, entitled "False Imprisonment," Plaintiff asserted that "Defendants used excessive and unreasonable force . . . and confined him by the use of handcuffs against his will and in violation of applicable State and Federal laws." (R. 1 – 29 – 8). Counts III and IV purported to state claims for "Sexual Battery" and "Intentional Infliction of Emotional Distress," respectively. (R. 1 – 29 – 8-9).

In a unilateral pretrial stipulation filed in 1991, Plaintiff asserted the following as "Issues of Law and Fact for Determination at Trial" in regard to the purported constitutional violations:

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[2] During the charge conference, defense counsel successfully argued that there was no constitutional provision that gives a right to be free from harassment. (R. 8 – 301-306). In regard to the racial allegations, Plaintiff conceded in both his deposition and at trial that the incident was not racially motivated. (R. 2 – 144 – 5; 6 – 116).

> 5. Whether the Defendants deprived Skinner of liberty without due process of law in violation of his rights under the Fifth and Fourteenth Amendments. . . .
>
> 6. Whether the Defendants falsely imprisoned Skinner . . . and confined him by the use of handcuffs in violation of applicable state and federal laws.
>
> * * *
>
> 9. Whether the Defendants . . . subjected the Plaintiff to deprivations of the following clearly established and well settled constitutional rights:
>
> a. Freedom from the excessive and unreasonable use of force;
>
> b. Freedom from the deprivation of liberty without due process of law; and
>
> c. Freedom from summary punishment.

(R. 2 – 123 – 4-5).

In a Joint Pretrial Stipulation filed in 1992, the parties included the following as an issue of ***law*** to be resolved by the Court: "[w]hether the alleged false imprisonment constitutes a "seizure" within the meaning of the Fourth Amendment, and if so whether that "seizure" was caused by a policy, practice on [sic] custom of the City of Miami." (R. 2 – 141 – 9).

The case proceeded to trial against the City and the fire chief, the sole remaining Defendants. Plaintiff admitted at trial that the five perpetrators were acting "outside

their authority" when they wrestled him to the floor and assaulted him.

Although the charge conference went on for several pages as to how the jury should be instructed in regard to the constitutional violation element of liability, Plaintiff only set forth a few lines from the entire colloquy. Petition at 3. A copy of this portion of the charge conference, which appears in the record in volume 8, document 220, pages 301 to 307, is attached hereto in the appendix [17a – 23a] for the Court's convenience. The Court is requested to review the colloquy in its entirety.

At the close of Plaintiff's case, the district court directed a verdict for the fire chief in both his individual and official capacities. The District Court denied the City's renewed motion to direct a verdict at the close of all the evidence; the jury returned a verdict against the City in the amount of $1.3 million. The district court denied the City's post-trial motions.

C. Eleventh Circuit Proceedings.

The question of whether Plaintiff did in fact suffer a constitutional deprivation at all was raised by the Court of Appeals during oral argument. The Court of Appeals allowed the parties to file post oral argument supplemental briefs. The Court of Appeals issued its opinion wherein it addressed only the constitutional question and not any of the other issues. Plaintiff filed a suggestion of rehearing en banc and the City responded thereto. Thereafter, the Court of Appeals denied the suggestion and Plaintiff filed the instant Petition.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT PLAINTIFF DID NOT SUFFER A CONSTITUTIONAL DEPRIVATION AND THAT THE CITY WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

The City does not quibble with Plaintiff's presentation of the law set forth in his Petition in regard to constitutionally afforded protections. However, as the Court of Appeals correctly discerned, those protections are not implicated under the circumstances of the instant case. What transpired at the fire station was nothing more than an immature, irresponsible, and distasteful incident that, at most, culminated in a state law tort.

A. Expansion of Substantive Due Process to Protect Against Horseplay By Immature, Irresponsible, and Inconsiderate Co-Workers is not Warranted.

The Fourteenth Amendment Due Process Clause does not require "the State to protect the life, liberty, and property of its citizens against invasion by private actors," or guarantee certain minimal levels of safety and security. *DeShaney v. Winnebago County Dept. of Social Serv.*, 489 U.S. 189, 195 (1989). Rather, the Due Process Clause "is phrased as a limitation on the State's power to act." *Id.*

The substantive component of the Fourteenth Amendment Due Process Clause protects fundamental rights, that is, those rights that are "implicit in the concept of ordered liberty," as well as individual liberty

against "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). The substantive element does not "purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U.S. at 332 (1986).

"The history of substantive due process 'counsels caution and restraint.' " *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, concurring) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977). For the most part, "the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

The doctrine of self restraint requires the Court to exercise the utmost care whenever it "is asked to break new ground" in substantive due process jurisprudence. *Id.* The Court adhered to this doctrine when it expressly rejected contentions that the substantive component of the Due Process Clause guarantees employees a safe and secure workplace or that it guarantees against incorrect or ill-advised personnel decisions. *See Collins*, 503 U.S. at 115; *Bishop v. Wood*, 426 U.S. 341 (1976).

Application of these polestar principles to the Petition filed in this case commands that the Court again

exercise the doctrine of self restraint. There is no constitutional implication to justify review.[3] By virtue of this lawsuit, Plaintiff attempts to transform an incident of horseplay perpetrated by immature, irresponsible and inconsiderate co-workers into a constitutional event. Imagine if every assault, battery, rape, or other physical touching, which heretofore was grounded in state law, is afforded substantive due process protection and therefore subject to redress under 42 U.S.C. §1983.

The Court of Appeals appropriately stifled Plaintiff's quest to break new ground in substantive due process jurisprudence because there are no guideposts for responsible decisionmaking. It ordered that the judgment be entered for the City as a matter of law based upon its astute recognition that all Plaintiff had proven was that he was assaulted, which "is a tort created by state law." *Skinner v. City of Miami*, 62 F. 3d 344, 347 (11th Cir. 1995).

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[3] Plaintiff asserts that the Court of Appeals' "decision creates explicit inter-circuit conflict with *McWilliams v. Fairfax County Board of Supervisors*, 72 F. 3d 1191 (4th Cir. 1996). . . . " Petition at 10. At the time that the Petition was filed, a Petition for Writ of Certiorari was pending (No. 95-1389). On October 7, 1996, the Court denied review. 65 USLW 3240, 65 USLW 3257, 117 S. Ct. 72 (Mem). Although that case involved both Title VII and a §1983 claim, the Court of Appeals cited one of its earlier cases that dealt with unreasonable paddling of a public school student by a school official for the proposition that the substantive element of Due Process protects against "unreasonable bodily intrusions by state-actors" to summarily conclude that the physical assaults against the plaintiff "would, if proven, constitute the infliction of a constitutional injury." 72 F. 3d at 1197.

The Court of Appeals was absolutely correct. Plaintiff's substantive rights are grounded in Florida's tort law. That is, under Florida law, the incident of horseplay perpetrated by Plaintiff's fellow firefighters was a battery, that is, a harmful or offensive contact, and an invasion of his privacy rights. *See Stockett v. Tolin*, 791 F. Supp. 1536 (S.D. Fla. 1992); *Chorak v. Naughton*, 409 So. 2d 35 (Fla. 2d DCA 1981). Battery and invasion of the right of privacy are actionable torts under Florida law. *See Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F. 2d 9 (5th Cir. 1962); *Chorak, supra; Kaczer v. Marrero*, 324 So. 2d 717 (Fla. 3d DCA 1976); *Tucker v. American Emp. Ins. Co.*, 171 So. 2d 437 (Fla. 2d DCA 1965). In fact, it is entirely possible that Plaintiff could bring a state law claim against his fellow firefighters for intentional infliction of emotional distress. *See Stockett*, 791 F. Supp. at 1556. Accordingly, the Court of Appeals judiciously declined the invitation to make a federal case out of substantive rights that are grounded in Florida's tort law.

B. Liberty Interest in Bodily Integrity is not Implicated.

The critical distinction between those cases cited by Plaintiff to suggest that his liberty interest in bodily integrity has been violated and the instant case is that the alleged wrong was committed by a state-actor. The person who perpetrated the alleged wrong did so under the auspices of color of law, that is, through the exercise of ostensible power or authority by virtue of said person's position. *See, e.g., Canedy v. Boardman*, 16 F. 3d 183 (female

prison guards observing male prisoners naked and conducting strip searches); *Doe v. Taylor Independent School Dist.*, 15 F. 3d 443 (5th Cir. 1994) (public school teacher accused of statutory rape and sexually fondling 15 yr. old student); *United States v. Tarpley*, 945 F. 2d 806 (5th Cir. 1991) (during assault of wife's lover, police officer claimed to have special authority for his actions by virtue of his official status); *Vang v. Toyed*, 944 F. 2d 476 (refugee plaintiffs raped by state employee responsible for interviewing and finding refugees suitable employment); *Stoneking v. Bradford Area School Dist.*, 882 F. 2d 720 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990) (public school band director used physical force, threats of reprisal, intimidation and coercion to sexually abuse, harass, and force student to engage in various sexual acts); *Hall v. Tawney*, 621 F. 2d 607 (4th Cir. 1980) (teacher paddled student).[4]

In contrast, the firefighters involved in this incident were not empowered or in any way authorized as part of their firefighting duties to engage in the activity that took place. The nature of the acts committed by the firefighters had absolutely no relation to their real or pretended

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[4] Similarly, in *McDowell v. Manchester Fire Dept.*, 769 F. Supp. 40 (D. N.H. 1990), cited by Plaintiff as being in accord with *McWilliams v. Fairfax County Board of Supervisors*, 72 F. 3d at 1191, the district court concluded that the fire captain was acting under color of law when he ordered a firefighter into his office and provoked a fight. That scenario is readily distinguishable from the instant case because the captain was authorized to order subordinates into his office. The firefighters herein were in no way authorized to wrestle, handcuff, and assault a fellow firefighter.

authority as City firefighters.[5] Plaintiff's own trial testimony established that on the very night of the incident, he told the firefighters that "[y]ou guys can go to jail for what you just did and you can lose your jobs." (R. 6 – 97). Plaintiff also testified that he knew that his fellow firefighters did not have the authority to commit the wrongdoing. (R. 6 – 91-92).

Absent a custodial situation or where one is involuntarily committed to an institution, the Due Process Clause does not protect a citizen from violence at the hands of non-government or third-party actors. *See, e.g., Lovins v. Lee,* 53 F. 3d 1208 (11th Cir. 1995) (no constitutional violation where woman was kidnapped and brutally raped by prisoner who had been temporarily released on a pass); *Wooten v. Campbell,* 49 F. 3d 696 (11th Cir.), *cert. denied,* 116 S.Ct. 379, 133 L.Ed.2d 302 (1995) (no constitutional violation where father abducted and killed son during an unsupervised visitation, even though son was in agencies' legal custody at time of incident); *Walton v. Alexander,* 44 F. 3d 1297 (5th Cir. 1995) (no constitutional

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[5] In the Court of Appeals, Plaintiff argued in his supplemental brief that his "commanding officer" committed the assault. One of the five firefighters was the "acting commanding officer" in the particular firestation when the incident occurred. There was no evidence whatsoever that the "acting commanding officer" was a final policymaker for the City so as to subject it for liability under §1983. Rather, this "acting commanding officer" was merely a firefighter in the classified ranks of the Fire Department with no policymaking authority whatsoever, and with not even the semblance of official authority to direct subordinates to engage in the activity that is the subject of this lawsuit.

violation where student attending a residential state institution for the deaf was twice sexually molested by a fellow classmate); *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F. 2d 1364 (3rd Cir. 1992) (no constitutional violation when male students physically, verbally, and sexually molested two female students).

In *D.R. v. Middle Bucks Area Vocational Technical School*, 72 F. 3d at 1364, two female students in a graphics arts class filed suit under 42 U.S.C. §1983 against, *inter alia*, various teachers and school officials. The Court of Appeals rejected the female students' contention that they fell within the umbrage of a custodial situation by virtue of having to attend school and found that the female students' freedom was not so restricted so as to prevent them from meeting their basic needs, and the school did not deny them meaningful access to sources of help. *See also J.O. v. Alton Community Unit School Dist.*, 909 F. 2d 267, 272 (7th Cir. 1990) (school boards have not rendered schoolchildren so helpless that an affirmative constitutional duty to protect arises). This analysis provides an excellent framework to reject any suggestion that a custodial situation is present herein because firefighters are required to "live" at the fire station during their hours on duty.

What happened in this case is an aberration.[6] Under these circumstances, the firefighters are third-party, non-

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[6] The bizarre nature of this incident is exemplified by the testimony of one of the firefighters at trial. The firefighter testified that he did not engage in this activity pursuant to a policy or direction of the City. Rather, he "did it out of camaraderie" as something he "would do to a friend."

government actors. Employers have little control over what employees chose to do behind closed doors or out of the watchful eye of superiors. The Constitution cannot be used to punish an employer for its employees' failure to acquire during childhood basic notions of common decency, consideration, and morality.

C. No Fourth Amendment Seizure.

Plaintiff's suggestion in his questions presented for review that the Court of Appeals erred in determining that his counsel abandoned his Fourth Amendment claim at oral argument is quizzical. A violation of a constitutional right is an essential element that must be found in order for there to be liability under §1983. Counsel for Plaintiff that argued the case before the Court of Appeals has been counsel of record since the inception of this lawsuit, which was filed only weeks after the incident occurred.[7] That Plaintiff's counsel would not "know" or "be prepared" to respond to a simple question regarding a fundamental element of his case, stipulated to or not, raised in the briefs or not, is absolutely incredible.

Two days after oral argument before the Court of Appeals, Plaintiff filed a "Post Argument Memorandum of Law" which the Court of Appeals ultimately treated as a supplemental brief. With the exception of one bald reference to the Fourth Amendment, Plaintiff submitted a

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[7] Plaintiff's counsel of record in the instant proceeding was not counsel of record before either the Court of Appeals or the district court.

supplemental brief limited to substantive due process.[8] This is consistent with Plaintiff's counsel's candid and correct admission at oral argument that there was no Fourth Amendment violation in this case.

Although the Fourth Amendment is not limited solely to criminal cases, the Fourth Amendment is not implicated under the circumstances of this case. As explained above, the conduct complained of did not occur under color of law or with state action attendant to the activity alleged to be violative of the Fourth Amendment. The conduct of Plaintiff's co-workers was in no way related to the duties of firefighters. A contrary holding would transform every assault, battery, rape, or other touching into an unconstitutional seizure. Surely the framers of the Constitution did not intend such a sweeping result.

D. *Lanier* Distinguished.

The instant case does not present the "civil analogue of the question presented in *Lanier*," as posited by Plaintiff. Petition at 10. The *Lanier* case involved a state Chancery Court judge who committed abhorrent and unlawful sexual acts in his chambers, frequently while he was wearing his judicial robe. The judge was indicted in

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[8] In the opening paragraph, Plaintiff stated that he "alleged the following constitutional violations under the Fourth, Fifth and Fourteenth Amendments . . . the use of excessive and unreasonable force, the deprivation of liberty without due process of law and summary punishment."

eleven counts under 18 U.S.C §242:[9] three felonies, eight misdemeanors.

Three of the victims worked for the judge and were in chambers when the incidents occurred. One of the victims was a Youth Service Officer, and during the course of an interview, the judge told her that he had sole hiring authority for the Youth Service Officer position. During the course of one of their weekly meetings, which occurred in chambers, the judge sat beside the victim and, in the midst of conversation, grabbed and squeezed her breast. After the victim confronted the judge about his actions, he complained about the quality of the victim's work and took supervisory authority away from her.

A recently divorced woman with two young children was another of the judge's victims. Having gone to work for the judge as his secretary, she understood that the judge was her supervisor and had the power to fire her. The judge touched, grabbed, and squeezed the victim, and continued to become more aggressive. He told her she could do anything she wanted if she slept with him. Although she ultimately quit, she endured the harassment and assaults for a period of time because she needed the job.

The judge presided over another victim's divorce proceeding and awarded custody of the child to the

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[9] 18 U.S.C. §242 provides in pertinent part that "[w]hoever, under color of any law . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined . . . or imprisoned. . . . "

victim. A couple of years later, the victim needed a job, and she filled out an application for a secretarial position at the courthouse. When the victim met with the judge in his chambers, he told her that her ex-husband had come to see him that day, the ex-husband complained that the victim was not a good mother, and that the ex-husband wanted custody of the child. Thereafter, he forced oral sex on the victim, and again on another occasion. The victim testified that she did not report either of the assaults because her child custody case had been before the judge, and she was afraid he would take her daughter away from her.

A jury rendered guilty verdicts as to two of the three felony counts and five of the eight misdemeanor counts. The Sixth Circuit reversed the convictions in a split *en banc* opinion. The majority found that Section 242 was "the most ambiguous of federal criminal statutes" in that it failed to provide notice to the public that "simple or sexual assault crimes" fell within its coverage. 73 F. 3d at 1384, 1394. The court observed that although the right not to be assaulted is a clear right under state law known to every reasonable person, "it is not publicly known or understood that this right rises to the level of a 'constitutional right.' " *Id.* at 1392.

A sampling of the incidents described above demonstrate that the defendant judge in *Lanier* abused his power and position under color of law to sexually assault and harass state judicial employees and litigants. The victims were intimidated by the judge's ostensible power to hire and/or fire them, or to control the outcome of litigation before him.

In contrast, the firefighters involved in the instant case did not abuse their power and position in order to perpetrate the incident herein. They did not use their position as a rank and file firefighter to threaten, intimidate, or coerce Plaintiff into doing what they wanted. Accordingly, there is absolutely nothing about the instant case that would render it "complimentary" to, or otherwise enhance, the Court's review of that horrendous case.

II.

THE COURT OF APPEALS IS NOT BOUND BY AN ERRONEOUS "STIPULATION" ON A PURE QUESTION OF LAW.

Legion are the cases where this Court and other Courts of Appeal have exercised their discretion and considered a legal issue or theory for the first time on appeal because the new issue or theory involved a pure question of law and/or the failure to consider it would result in a miscarriage of justice. *Kamen v. Kemper Financial Serv.*, 500 U.S. 90 (1991); *Singleton v. Wulff*, 428 U.S. 106-120-121 (1976); *Ford v. United States*, 989 F. 2d 450, 453 (11th Cir. 1993); *Daigle v. Shell Oil Co.*, 972 F. 2d 1527, 1539 (10th Cir. 1992); *United States v. Phelps*, 955 F. 2d 1258, 1265-66 (9th Cir. 1992); *Independent Insurance Agents v. Clarke*, 955 F. 2d 7312, 733-34 (D.C. Cir. 1991), *reversed on other grounds*, 508 U.S. 439 (1993);[10] *Mike Ousley*

[10] Interestly in that case, the Court rejected the petitioner's stance that it could not review a particular issue because the issue was not briefed until the Court of Appeals ordered supplemental briefing after oral argument.

Productions, Inc. v. WJBF-TV, 952 F. 2d 381, 383 (11th Cir. 1992); *Fane v. Edenfield*, 945 F. 2d 1515, 1519 n. 11 (11th Cir. 1991), *affirmed*, 507 U.S. 760 (1993); *McGinnis v. Ingram Equipment Co.*, 918 F. 2d 1491, 1495 (11th Cir. 1990); *Booth v. Hume Publishing Co.*, 902 F. 2d 925, 928 (11th Cir. 1990); *North Mississippi Communications, Inc. v. Jones*, 874 F. 2d 1064, 1068-69 (5th Cir. 1989); *United States v. Southern Fabricating Co., Inc.*, 764 F. 2d 780, 781 (11th Cir. 1985); *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F. 2d 355, 359-61 (11th Cir. 1984). "[W]hether the plaintiff has asserted a violation of a constitutional right at all . . . [is a] purely legal question. . . . " *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

Moreover, the Court of Appeals was not bound, nor was its discretion impaired or limited by the parties' stipulation on a pure question of law. *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439 (1993) ("[a]fter giving the parties ample opportunity to address the issue, the Court of Appeals acted without any impropriety in refusing to accept what in effect was a stipulation on a question of law"); *United States v. Burke*, 504 U.S. 229 (1992) (Scalia, J., concurring) (a court "need not render judgment on the basis of a rule of law whose nonexistence is apparent on the face of things, simply because the parties agree upon it"); *Estate of Sanford v. Commissioner of Internal Revenue*, 308 U.S. 39, 51 (1939) ("[w]e are not bound to accept, as controlling, stipulations as to questions of law"); *Swift & Co. v. Hocking Valley Railway Co.*, 243 U.S. 281, 289 (1917) ("[i]f the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative; since the court cannot be controlled by

agreement of counsel on a subsidiary question of law . . . [w]e treat the stipulation . . . as a nullity").

Similarly, any stipulation during the charge conference that Plaintiff suffered a constitutional deprivation is a nullity. There were no questions of fact as to what transpired during the course of this detestable incident. Therefore, the Court of Appeals acted well within the purview of its discretion when it considered the purely legal question as to whether Plaintiff did in fact suffer a constitutional violation – an essential element of his case.

The failure to consider whether Plaintiff suffered a constitutional violation at all would have resulted in a miscarriage of justice. Under the plain language of 42 U.S.C. §1983, the plaintiff must have suffered a constitutional violation – causally related to a custom, policy, or practice – that was executed under color of law, in order to establish municipal liability. Stated otherwise, there is no basis for municipal liability in the absence of a constitutional violation that is causally related to a custom, policy, or practice. Since Plaintiff herein suffered no constitutional violation as a matter of law, the district court should have directed a verdict in the City's favor (just as it did for the fire chief), and not submitted the case to the jury. It would be a travesty to sustain a liability determination for a civil rights violation based on a nonexistent constitutional violation.

CONCLUSION

Respondent, Defendant/Appellant below, City of Miami, respectfully requests the Court to **deny** the Petition for Writ of Certiorari.

Respectfully submitted,

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Herman SKINNER, Plaintiff-Appellee,

v.

CITY OF MIAMI, FLORIDA,
Defendant-Appellant,

Charles V. Boyd, Osvaldo Iglesias, Michael S. Whittington, Pedro Gomez, Charles K. McDermott, Colonel H. Duke, Defendants.

No. 93-4324.

United States Court of Appeals,
Eleventh Circuit.

Aug. 25, 1995.

Charles C. Mays, Asst. City Atty., Kathryn S. Pecko, Asst. City Atty., Miami, FL, for appellant.

Irving M. Miller, Susan Eisenberg, Miami, FL, for appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, BLACK, Circuit Judge, and KAUFMAN*, Senior District Judge.

TJOFLAT, Chief Judge:

The City of Miami (the "City") appeals a $1.3 million verdict based on liability under 42 U.S.C. section 1983. Herman Skinner, a fire fighter, sued the City for injuries he sustained from a hazing incident. Because Skinner is

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*Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

unable to prove a violation of a right secured by the United States Constitution or federal law, we reverse the district court's denial of the City's motion for judgment as a matter of law.

I.

The facts giving rise to this lawsuit are not in dispute. Herman Skinner, Charles V. Boyd, Osvaldo Iglesias, Michael S. Whittington, Pedro Gomez, and Charles K. McDermott were fire fighters employed by the City of Miami. With the exception of Skinner, the fire fighters were assigned to Fire Station No. 3. Skinner, who was assigned to Fire Station No. 4, was temporarily assigned to Fire Station No. 3 on the morning of December 9, 1989, as he had been between five and ten times before. During those prior assignments, Skinner developed a sense of camaraderie with the other fire fighters, which included engaging in joking, singing, and wrestling. For example, Skinner once jokingly placed his arm around Iglesias' neck and told Iglesias that "he looked good, and that if the two were stranded on an island together, Skinner would make Iglesias his woman."

When Skinner reported to Station No. 3 on the morning of December 9, the other fire fighters were asleep. Charles Boyd warned Skinner that "if you don't get out of here with all this loud noise, we are going to get you when we wake up." The day proceeded uneventfully with several of the fire fighters discussing a local high-profile criminal trial and singing a song.

After the singing ended, while Skinner sat in a chair and watched television, Boyd and Iglesias, assisted by

McDermott and Whittington, approached him from behind and wrestled him to the floor. Handcuffs were applied to Skinner's wrists while he was on the floor. As Skinner was on the floor handcuffed, Boyd, who was naked, straddled Skinner's chest, grabbed Skinner's head, and rubbed his scrotum over the top of Skinner's head. Everyone present laughed except for Skinner, who demanded that the handcuffs be removed.

When the handcuffs were removed, Skinner chased Boyd. Skinner caught Boyd, but eventually walked back into the room holding Boyd's arm. Later, Skinner retaliated by grabbing Boyd's testicles causing Boyd to cry and scream. Three fire fighters eventually pulled Skinner away from Boyd. Skinner also attempted to bite Gomez's nipple and bent Iglesias' finger backwards.

On January 23, 1990, Skinner filed suit against the City of Miami, the Chief of the Fire Department (the "Chief") in his official capacity, and numerous fire fighters. Skinner asserted liability for violations of the Fifth and Fourteenth Amendments under section 1983 and pendent state law claims. On April 24, 1990, Skinner filed an amended complaint suing the City, the Chief in his individual and official capacities, and the fire fighters in their individual and official capacities, alleging violations of his Fourth, Fifth, and Fifteenth Amendment rights, as well as pendent state law claims. Specifically, Skinner alleged that the City "has a custom or policy of authorizing its fire fighters to engage in horseplay and hazing which exceeds the bounds of good taste and safety and is destructive to the morale of minority fire fighters and is so extreme that it violates certain rights secured to said persons by the constitution and laws of

the United States." Record, vol. 1, at 4, No. 29. Skinner alleged that the City's practices violated the Fourth, Fifth, and Fourteenth Amendments, which "prohibit the use of excessive and unreasonable force; prohibit the deprivation of liberty without due process of law; and provide freedom from summary punishment." Record, vol. 1, at 7-8, No. 29.

Discovery ensued, and the individual fire fighters filed a host of counterclaims. Skinner reached confidential cash settlements with the individual fire fighters prior to trial. The City and Chief moved for summary judgment contending that Skinner had not been subjected to injuries under color of law and that the City and Chief did not unconstitutionally train, supervise, and discipline fire fighters. The district court denied the motion. The case was tried for five days (December 21, 1992 through December 30, 1992) before a jury. At the close of plaintiff's case, the City and Chief moved for judgment as a matter of law on the bases that plaintiff failed to prove any custom, practice, or policy or that the fire fighters were acting under color of law. Record, vol. 8, at 40, No. 236. The district court granted the motion as to the Chief, in both his individual and official capacities, but denied it as to the City. The jury returned a verdict in the amount of $1.3 million. The district court denied the City's motions for judgment as a matter of law, and in the alternative, for a new trial, and entered final judgment. This appeal followed.

II.

Section 1983 states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. "[Section] 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.' " *Graham v. Connor*, 490 U.S. 386, 393-94, 109 S.Ct. 1865, 1870, 104 L.Ed.2d 443 (1989) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n. 3, 99 S.Ct. 2689, 2695 n. 3, 61 L.Ed.2d 433 (1979)). To succeed, a section 1983 plaintiff must show a violation of a right secured by federal law.

Skinner alleged in his amended complaint violations of the Fourth, Fifth, and Fourteenth Amendments. At oral argument, Skinner's counsel acknowledged that there had been no Fourth Amendment violation. We are left with a substantive due process claim.[1] The substantive element of the Due Process Clause protects those rights that are "fundamental" – rights that are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S.

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[1] The Due Process Clause of the Fourteenth Amendment states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). The Supreme Court has deemed that most, but not all, of the rights enumerated in the Bill of Rights are fundamental. Certain unenumerated rights, such as the right to privacy, also merit protection. *See, e.g., Planned Parenthood v. Casey*, ___ U.S. ___, ___, 112 S.Ct. 2791, 2807, 120 L.Ed.2d 674 (1992).

Although the Supreme Court has extended substantive due process protection to certain unenumerated rights, it has not extended Fourteenth Amendment coverage to many areas. Tort law is one such area that remains largely outside the scope of substantive due process jurisprudence. *Daniels v. Williams*, 474 U.S. 327, 332, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986) (noting that the Due Process Clause "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society"); *Wright v. Lovin*, 32 F.3d 538, 540 (11th Cir.1994). "[S]ubstantive rights . . . created *only* by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process Clause because 'substantive due process rights are created only by the Constitution.' " *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir.1994) (en banc) (emphasis added) (quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229, 106 S.Ct. 507, 515, 88 L.Ed.2d 523 (1985) (Powell, J., concurring)), *cert. denied*, ___ U.S. ___, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995).

> [T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-

> ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Collins v. City of Harker Heights, 503 U.S. 115, 125, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261 (1992) (citation omitted). Skinner has proven that he was assaulted – that, however, is a tort created by state law, and not necessarily a violation of a constitutional right.[2] Skinner has failed to show a violation of any right secured by federal law either under the Constitution or a federal statute.

Skinner argues that we should not consider the issue of a constitutional violation because it was not raised by the City in the district court or on appeal. Minimal attention was paid to the issue of a constitutional violation in the district court.[3] Although as a general rule, an

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[2] The record does not support the dissent's implication that the City committed any deliberate acts to injure Skinner. At most, the evidence suggests that certain fire department officials knew that hazing incidents had occurred at some points in the past. This, however, falls short of demonstrating that the City violated a substantive constitutional right.

[3] This treatment is exemplified by the imprecise and scattered manner in which the district court instructed the jury on Skinner's constitutional claims:

> Plaintiff, Herman Skinner, has alleged that the defendant, the City of Miami, has deprived him of his constitutionally guaranteed right to be free from unreasonable seizures or physical abuse.
>
> You, the jury, are instructed that Title 42 U.S.C. Section 1983 provides a federal remedy for the deprivation of rights, privileges, or immunities

appellate court will not consider a legal issue or theory raised for the first time on appeal, *Lattimore v. Oman*

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secured by the Constitution or the law of the United States.

Instruction No. 8A, Record, Vol. 3, at 12, No. 180.

> In order to determine whether a plaintiff can recover from a defendant under 42 U.S.C. Section 1983 for deprivation of his constitutionally guaranteed rights to be free from unlawful seizure or physical abuse, you would have to determine whether such deprivation occurred. However, the parties have agreed that said seizure and physical abuse did occur.
>
> Specifically, Herman Skinner claims that five fire fighters while acting under color of authority of the State of Florida as members of the Fire and Rescue and Inspection Services Department of the City of Miami made an unprovoked attack upon Plaintiff in violation of his constitutional rights. It is alleged that these fire fighters intentionally violated Skinner's constitutional rights including the right to be free from the use of excessive and unreasonable force, physical abuse and the right not to be deprived of his liberty without due process of law. Plaintiff alleges that the City of Miami is liable for this constitutional deprivation because the actions of these fire fighters were permitted to occur because of customs, practices or policies of the City of Miami Fire Department which reflect a deliberate indifference to the rights of persons employed as fire fighters.

Instruction No. 8B, Record, Vol. 3, at 13, No. 180.

> In order to prove his claim, Herman Skinner must prove by a preponderance of the evidence each of the following facts:

Constr., 868 F.2d 437, 439 (11th Cir.1989) (per curiam), we have discretion to do so if the new issue or theory "involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice," *United States v. Southern Fabricating Co.*, 764 F.2d 780, 781 (11th Cir.1985) (per curiam) (quotation omitted). Whether a constitutional violation has occurred is a question of law and the refusal to consider it would result in a miscarriage of justice – especially when a $1.3 million verdict is at issue. The issue, moreover, was not ignored entirely during the proceedings below. When discussing proposed jury instructions, counsel for the City did object to proposed wording and acknowledged that "in order for [plaintiff] to have a [section] 1983 case, you [must] have a right that exists under the Federal constitution or [under a] Federal statute." Record, Vol. 8, at 301.

We have given the parties ample opportunity to be heard on the subject, both at oral argument and through supplemental briefing. At no time has Skinner been able to point to any authority demonstrating that he has suffered a constitutional deprivation as opposed to a state law tort. The cases he relies on arose in the custodial setting and are inapposite.[4] *See, e.g., Cannon v. Macon*

> 1) that the fire fighters intentionally committed acts which violated one or more of Skinner's constitutional rights previously mentioned. . . .

Instruction No. 8C, Record, Vol. 3, at 14, No. 180.

[4] At oral argument, Skinner relied on *MacDowell v. Manchester Fire Dep't*, 769 F.Supp. 40 (D.N.H.1990), for the proposition that a government employee owes a co-worker a *constitutional* duty not to engage in harassing behavior. Our review of that case does not support such a reading, nor could we find any case to support such a proposition.

County, 1 F.3d 1558 (11th Cir.1993); *Douthit v. Jones*, 619 F.2d 527 (5th Cir.1980).[5] We, therefore, must conclude that although Skinner was the victim of a state law tort, he has not shown a constitutional violation. Consequently, he is not entitled to relief under section 1983.

We REVERSE and REMAND this case to the district court for entry of judgment in accordance with the City's motion for judgment as a matter of law.

IT IS SO ORDERED.

FRANK A. KAUFMAN, Senior District Judge, dissenting:

Chief Judge Tjoflat cites to and quotes from *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). In *Collins*, Justice Stevens, after noting the difference between "(1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the City is responsible for that violation", 503 U.S. at 120, 112 S.Ct. at 1065-66, analyzed the first issue in terms of substantive due process and quoted from *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989), (quoting *Davidson v. Cannon*, 474 U.S. 344, 348, 106 S.Ct. 668, 670-71, 88 L.Ed.2d 677 (1986)), that substantive due process is only violated when government involves itself in "abusing [its] power, or employing it as an instrument of oppression" or when "an omission can . . . properly be

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[5] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

characterized as . . . arbitrary or conscience-shocking, in a constitutional sense", rather than in the context of "a fairly typical state law tort claim." 503 U.S. at 126-28, 112 S.Ct. at 1069-70. That approach by Justice Stevens would appear fully in line with the standard in *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), adopted in cases such as *McKinney v. Pate*, 20 F.3d 1550, 1556, n. 7 (11th Cir.1994), and *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1500 (11th Cir.1985), *cert. denied*, 476 U.S. 1115, 106 S.Ct. 1970, 90 L.Ed.2d 654 (1986).[1] In *Gilmere* at 1500-01, Judge Vance quoted Judge Friendly's observations in *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973):

> Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights. In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Johnson v. Glick took place in a prison setting. In the majority opinion, Judge Tjoflat distinguishes prison cases on the grounds that matters which arise in a custodial setting are hardly fully applicable in an employment,

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[1] But see the reservations as expressed by Judge Tjoflat's separate opinion, joined in by Judges Roney and Fay, in *Gilmere* at 1511, n. 21; see also *McKinney* at 1556, n. 7.

non-custodial setting of the type set forth in the within case. I fully agree. However, that does not mean that substantive due process provides no protection for persons in the position of Skinner in a state employment situation. Rather, the test set forth in *Collins*, which itself involved an employment relationship and not a custodial setting, still remains fully applicable in a case such as this case.

An examination of the record in this case discloses that Skinner presented considerable evidence showing a long standing custom and practice of unfettered hazing by fellow employees, on a number of occasions, including group attacks upon a single fire fighter who had been recently promoted or married, or the like. Such evidence includes incidents during which four or five fire fighters held a fire fighter selected as their victim, while one or more other fire fighters painted the genitals of the victim and other fire fighters looked on, having, in one or more instances, been alerted by announcement over the loudspeaker system within the firehouse that the event was about to take place. There was, in addition, evidence that such occurrences had become sufficiently traditional, to have caused special vocabulary to be developed. The so called "three man lift" were words used with regard to the type of occurrence described *supra*. The words "red assing" were employed generally to describe a certain form of hazing. The evidence also was rather specific concerning the knowledge of such practices held by the Chief of the Fire Department and by other responsible officials of that department and that such officials had, at most, ineffectually attempted to stop the practices. Such evidence falls within the standards adopted by the

Supreme Court in *Collins*, 503 U.S. at 126, 112 S.Ct. at 1069, of abuse of power, and actions which constitute oppressive behavior by superiors in permitting fellow employees to engage in the same, and also adds up to "conscience shocking" behavior exceeding the typical state law tort claim on behalf of one employee against one or more other employees of the State. Further, such practices were permitted to continue over a long period of time and fell beyond the single type of "push or shove" occurrence referred to by Judge Friendly in *Johnson v. Glick*, at 1033.[2] Nor do such practices constitute the kind of behavior which governmental officials may ignore without liability. See, by way of contrast, *Lovins v. Lee*, 53 F.3d 1208 (11th Cir.1995), in which governmental officials were held non-liable for rape by a violent criminal allegedly, wrongfully released on a temporary pass from prison.

In his majority opinion, the Chief Judge has written[3]: "The record does not support the dissent's implication that the City committed any deliberate acts to injure Skinner. At most, the evidence suggests that certain fire department officials knew that hazing incidents had occurred at some points in the past. This, however, falls

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[2] *MacDowell v. Manchester Fire Dep't.*, 769 F.Supp. 40 (D.N.H.1990), relied on by Skinner and discussed by Judge Tjoflat, *see* n. 3 of the majority opinion, may well have only involved such a single type of event; accordingly its authority may be questionable.

[3] See n. 2 of the majority opinion.

short of demonstrating that the City violated a substantive constitutional right". I respectfully disagree. A deliberate act to injure on the part of the City of Miami is not necessary to establish liability pursuant to § 1983. Rather, a municipality may be subject to § 1983 liability if plaintiff establishes "a widespread practice that, 'although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a 'custom or usage' with the force of law,' (citations omitted). In other words, a longstanding and widespread practice is deemed authorized by the policymaking officials because they must have known about it but failed to stop it." *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1481 (11th Cir.1991).[4] In the within case, there is quite a bit of

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[4] *See also Church v. City of Huntsville*, 30 F.3d 1332, 1345-1347 (11th Cir.1994); *Brooks v. Scheib*, 813 F.2d 1191, 1193 (11th Cir.1987) ("(a) municipality's failure to correct the constitutionally offensive actions of its police department may rise to the level of a 'custom or policy' if the municipality tacitly authorizes these actions or displays deliberate indifference towards the police misconduct (citations omitted))"; *Depew v. City of St. Mary's*, 787 F.2d 1496, 1499 (11th Cir.1986). Authority to the same effect also emanates from other Circuits; *see, e.g., McNabola v. Chicago Transit Authority*, 10 F.3d 501, 511 (7th Cir.1993) (quoting from the Eleventh Circuit's opinion in *Brown*); *Bordanaro v. McLeod*, 871 F.2d 1151, 1157 (1st Cir.), *cert. denied*, 493 U.S. 820, 110 S.Ct. 75, 107 L.Ed.2d 42 (1989); *Spell v. McDaniel*, 824 F.2d 1380, 1386-87 (4th Cir.1987), *cert. denied*, 484 U.S. 1027, 108 S.Ct. 752, 98 L.Ed.2d 765 (1988). Individual liability, as contrasted with liability pursuant to *Monell v. Dep't of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), can also stem from such omissions. *See Swint v. City of Wadley*, 51 F.3d 988, 999 (11th Cir.1995), involving an arrest, not an employment setting. But that distinction, as discussed *supra* in the body of this dissent, does not, in my view, adversely affect

evidence of just such a failure to stop a known, widespread practice, and also of the fact that there were scattered ineffectual attempts to curtail that practice. Those ineffectual attempts support the verdict of the jury in favor of the plaintiff – they do not undermine it.

In his majority opinion, Judge Tjoflat writes "[m]inimal attention was paid to the issue of a constitutional violation in the district court", and refers to the fact that the district court simply instructed the jury that Skinner had claimed denial of his "constitutionally guaranteed right to be free from unreasonable seizures or physical abuse." See n. 2 in the majority opinion, along with parts of the record setting forth the jury instructions relating to the roles played by responsible officials of the City of Miami. Certainly it would have been better for the trial judge to have utilized the standards enunciated by Justice Stevens in *Collins* and by Judge Friendly in *Johnson v. Glick*. But the record does not disclose that defendants-appellants specifically requested such instructions, or even, in general, requested the inclusion of the same in the jury instructions. Under the circumstances, it would appear that the jury instructions were not so lacking in compliance with applicable legal standards so as to require a new trial in order to avoid a miscarriage of justice.

That is particularly true in this case in which, from my point of view, there is more than ample evidence to sustain the jury's verdict and to support affirmative

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the application herein of a combination of the standards of *Collins* and *Monell* so as to require anything other than affirmance of the judgment below.

answers by the jury to the two discrete questions posed by *Collins*, namely that (1) "plaintiff's harm was caused by federal constitutional violation", and (2) "The City is responsible for that violation." *Collins*, 503 U.S. at 120, 112 S.Ct. at 1066.

For the reasons set forth in this separate opinion, I respectfully dissent and would affirm the judgment of the district court.

[p. 301] THE COURT: Pardon, okay.

MR. MAYS: The first paragraph, it says, "has a private or constitutional guaranteed right to be free from unreasonable seizures." That is a constitutional right, no problem with that. "Accompanied by degrading and humiliating embarrassment."

THE COURT: I put harassment.

MR. MAYS: Judge, there is nothing in the constitution, Baker versus McCullum, and the Court is familiar with that, Baker versus McCullum indicates and states quite clearly that 1983 protects Federally protected rights, and in order for it to have a 1983 case, you got to have a right that exists under the Federal constitution of the Federal statute. There is nothing in the Federal constitution that gives us a right to be free from harassment.

THE COURT: You are a strict constructionist. An original intent fellow.

MR. MAYS: I am a very liberal person from the standpoint of interpreting the United States constitution, but notwithstanding how liberal I can be, I can find nothing in that document that says you have a right to be free from harassment.

THE COURT: How about the Fourteenth Amendment?

MR. MAYS: The Fourteenth Amendment has different [p. 302] components. The Fourteenth Amendment has a life, liberty, property. Obviously we are not talking about life here. We are talking about a seizure that took place.

THE COURT: Liberty to be free to do things: Travel, work, not be handcuffed. We can go through all the details, not to have someone's private parts be placed on your head, things of that nature.

MR. MAYS: Board of Regents is [sic] versus Roth, the Court is familiar with that. The Supreme Court there said the liberty clause in the Federal Constitution is not so broad and encompassing so as to include everything that we think ought to be a constitutional right.

Hall versus Davis, United States Supreme Court said the same thing, the liberty clause and the liberty interests that the constitution protects is no [sic] so encompassing so as to include everything under the sun. Instead we have to be able to identify something specific here.

THE COURT: They have. You don't wanted [sic] me to write that in in the instruction, do you?

MR. MAYS: No, but we have to figure out what we are talking about. You have the right to be free from unreasonable seizures. That is true.

THE COURT: The handcuffing.

MR. MAYS: The handcuffing, and in addition thereto, the force that they used, which was placeing [sic] the scrotum on [p. 303] top of this man's head.

THE COURT: Okay, and how do I say that in jury instructions?

MR. MAYS: To be free from unreasonable seizures, what we are talking about is degrading and humiliating harassment.

THE COURT: That's what I was talking about.

MR. MAYS: Judge, we say that, we might as well give the jury a verdict.

THE COURT: I give them a form. I am going to give them a form.

MR. MAYS: But you might as well, if this language is in there to the jury instruction, then there is no reason for the jury to deliberate.

THE COURT: Why?

MR. MAYS: There is nothing in the federal constitution that would give them such a right.

THE COURT: What does the plaintiff want to say other than you probably disagree.

MS. EISENBERG: There needs to be further instruction, other than the unreasonable seizure, because there are other allegations that we have of violation under the Fourteenth Amendment.

THE COURT: I put that in, in another instruction.

Do you think if I just say "free from unreasonable [p. 304] seizures" period and give the other instructions that I propose to give, you are covered, right, you would not have any objection.

MS. EISENBERG: Yes, if we could take that language and move it into this instruction as well, the Fourteenth Amendment instruction, because –

THE COURT: Now say that again. You mean delete "accompanied by degrading and humiliating

harassment" as being duplicitous since I will give further instructions that you can tell that probably the defendant will object. So let me deal with one portion at a time.

MS. EISENBERG: Your Honor, if you are going to say in 8-A that deprive him of his constitutional guaranteed rights, and you are talking about unreasonable seizures, I think you also need to say "free from the use of excessive and unreasonable force."

THE COURT: How about if I just say "constitutionally guaranteed rights" period, since I explain all those rights later on.

Any problem from the plaintiff?

MS. EISENBERG: That is fine.

THE COURT: Any problem from the defendant?

MR. MAYS: Well, Judge.

THE COURT: Any objection if I just change "must have deprived him of his constitutional guaranteed rights" [p. 305] and then I will explain it later on.

MR. MAYS: Why don't we do this. Let's leave in "to be free from unreasonable seizures and physical abuse." That's what we are talking about, physical abuse.

THE COURT: Okay.

MR. MAYS: If you look at the Broward decision, Broward versus County of Inyo (phonetic), United States Supreme Court 1988 and the cases following that, if a situation does not violate the Fourth Amendment, then it

could indeed give rise to a violation of substantive due process.

THE COURT: By physical abuse.

MR. MAYS: By physical abuse.

MS. EISENBERG: Physical abuse is fine.

THE COURT: How about if we put "or physical abuse." That way there is an or.

MR. MAYS: Or physical abuse.

THE COURT: Okay.

Instruction No. 8B.

Any objection from the plaintiff?

MS. EISENBERG: Yes, Your Honor.

THE COURT: Okay. Where?

MS. EISENBERG: In the first paragraph, it indicates that you must first determine whether said seizure and harassment did occur. The parties have stipulated that [p. 306] the act did occur. Nobody is denying that and nobody is denying that the act violated his constitutional rights. It is part of the pretrial stipulation.

THE COURT: Let me ask Mr. Mays.

Do you agree or disagree?

MR. MAYS: She might be right, but the problem that I have with that is, I think she is right about that first portion of it, Judge, but the problem that I have is you have, we have got offending language in this again, "degrading and humiliating harassment."

THE COURT: Okay. Well, I can change it again to physical abuse.

MR. MAYS: Physical abuse.

THE COURT: And/or physical abuse, so I can change that, and then just eliminate "you must first determine whether said seizure and harassment did occur." Since there is a stipulation, should I instruct the jury on that?

MS. EISENBERG: Yes, the jury should be instructed.

MR. MAYS: Yes, let the jury know that I have agreed to that.

THE COURT: Okay. The parties have agreed.

MS. EISENBERG: That the seizure and physical abuse, if that is what you want to call it.

THE COURT: That seizure and physical abuse did occur, so there is a stipulation that Mr. Skinner's [p. 307] constitutional rights were violated?

MR. MAYS: Yes, Your Honor.

THE COURT: I ask a lot of tough questions, don't I, but I want you to, whatever the jury decides, I want to make it easy for those three wiser judges up there, whoever appeals, if there is an appeal.

Then we we [sic] should not ask the jury to make that determination.

Then, any objection to the second paragraph?

From the plaintiff?

MS. EISENBERG: No objection.

THE COURT: Okay. It sounds familiar, doesn't it.

From the defendant, any objection?

MR. MAYS: Yes, Your Honor.

In the middle of that paragraph you have included physical harassment. We need to change that harassment to abuse.

THE COURT: Okay.

MS. EISENBERG: No objection.

THE COURT: We will change that.

Other than that, there is no objection to instruction No. 8B on Page 13?

MR. MAYS: Except for the last sentence, Your Honor. It goes to deliberate indifference to the rights of persons employed as firefighters.

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Supreme Court, U.S.
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No. 96-388

In The

Supreme Court of the United States

October Term, 1996

HERMAN SKINNER,

Petitioner,

vs.

CITY OF MIAMI, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARGUMENT

As we noted, the City conceded both at trial and on appeal that if it was responsible for the fire fighters' conduct, that conduct amounted to a due process violation cognizable under 42 U.S.C. § 1983. The City confined its argument to its contention that the fire fighters had not acted under color of law, because they were not themselves policymakers, and because the City had no policy, custom or practice reflecting deliberate indifference to the plaintiff's rights. In light of overwhelming evidence to the contrary – some of it summarized by the dissent (12a) – both the jury and the district court rejected that contention; and the majority opinion of the court of appeals ignored the argument entirely, instead raising sua sponte the issue addressed in our petition – whether the fire fighters' conduct, if it did occur under color of law, rose to the level of a constitutional violation.

Given this scenario, it is curious at the least that the City in its response has chosen not to defend the court of appeals' rationale, but instead to resurrect the "color-of-law" framework which the jury rejected and the appellate court chose not to address. On every point which we made, the City's response is not a frontal rebuttal but a shift to the side; it argues not that the case which we cited is distinguishable in the quality of the rights asserted (which is the point for which we cited it), but solely because the cited case clearly involved governmental responsibility, while the instant case assertedly does not.

Thus the City says (response at 15-18) that *United States v. Lanier*[1] is distinguishable not because the conduct in *Lanier* more-clearly implicated constitutional rights, but rather because the offending judge in *Lanier* was "wearing his judicial robe" (response at 5), and thus "abused his position and power under color of law" (response at 17). And the City says (response at 9 & n.3) that *McWilliams v. Fairfax County Board of Supervisors*[2] creates no inter-circuit conflict, not because the County employees' sexual taunting and abuse in *McWilliams* more-clearly implicated constitutional rights, but only because *McWilliams* in turn relied upon an earlier case involving a "school official" – clearly a state actor. And the same assertedly is true of *MacDowell v. Massachusetts Fire Department*, 769 F. Supp. 40 (D.N.H. 1990), in which the offender was a "fire captain . . . acting under color of law" (response at 11 n.4). Likewise, all of the other cases which we cited by analogy are subject to the "critical distinction . . . that the wrong was committed by a state-actor" (response at 10). Thus the City's sole argument against certiorari is that the defendant "fire fighters are third-party, non-government actors" (response at 13-14). Its sole argument is a point which was not addressed by the court of appeals.

This is a risky strategy, because it concedes by its silence that the *holding* of this case – the point which the court of appeals *did* make – indeed conflicts with the

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[1] 73 F. 3d 1380 (6th Cir.), *cert. granted*, ___ U.S. ___, 116 S. Ct. 2522, 135 L. Ed. 2d 1047 (1996).

[2] 72 F. 3d 1191 (4th Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 72, ___ L. Ed. 2d ___ (1996).

authorities which we cited. And that conflict itself warrants review by this Court. If and when this Court resolves the conflict, there will be time enough on remand for the court of appeals to address the "state-actor" issue, in light of the history of official indifference referenced in part by the dissenting opinion. For the moment, the sole question is whether the court of appeals' holding is worthy of review – and the City now has conceded that question.

The City also has conceded by omission our second point – that the court of appeals erred in excusing the City's explicit stipulation, of which the district court instructed the jury, that the plaintiff's constitutional rights were implicated. We acknowledged that an appellate court may excuse a waiver on an issue of law; but we demonstrated that the issue here is fact-specific (petition at 17-18). The City cites back to us the same cases stating the general principle (response at 18-19), but ignores the distinction. We also contended (petition at 18) that even if the issue were one of law, the criteria for recognizing fundamental error are not satisfied in this case, because the point of law is not indisputable. No response from the City. Thus, the court of appeals overstepped in its zeal to excuse the City's concession – even as it enforced a far-more casual "waiver" by the plaintiff, based upon some undisclosed comment at oral argument, of the plaintiff's longstanding Fourth Amendment claim.

CONCLUSION

It is respectfully submitted that a writ of certiorari should issue to review the court of appeals' decision.

Respectfully submitted,

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